UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 3:13-CR-204
	)	
vs.	)	
	)	
BOGGS PAVING, INC., CARL ANDREW BOGGS, III, KEVIN HICKS, GREG MILLER, GREG TUCKER & JOHN CUTHBERTSON,	)	
	)	
Defendants.	)	
________________________________	)	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE MAX O. COGBURN, JR.
UNITED STATES DISTRICT COURT JUDGE
NOVEMBER 23, 2015

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P R O C E E D I N G S

(Court called to order at 9:03 a.m.)

THE COURT: Okay. We have some work to do today. Let's talk about -- first of all, let's go back and we'll -- I'll hear some last arguments with regard to role in the offense and also with regard to what the loss amount ought to be under the guidelines.

Let me go ahead and let Mr. Bell talk first.

MR. BELL: Your Honor, with -- I don't know if you want to do role enhancement right now. I had some transcripts --

THE COURT: That's right, you had some things you wanted to put in first.

MR. BELL: We can talk about loss amount and then come back and talk about --

THE COURT: Let's go ahead -- let's go ahead and get in what we need to get in. Thank you, Mr. Bell, for pointing that out to me.

MR. BELL: Your Honor, if you don't mind, I want to read into the record some sentencing portions of Kristy Lawrence's grand jury transcript. If you don't mind, it would be easier for me if I sat down while I did that.

THE COURT: That's fine.

MR. BELL: It might take me 10 or 15 minutes to read in all the things that I'd like.

THE COURT: That's okay. That would be a long time for a man of your years to be on his feet, so go ahead and sit down.

MR. BELL: Of my years, yes, Your Honor.

Your Honor, this is from the grand jury transcript of Kristy Bartlett Lawrence that was taken on June 20th of 2012.

Page 10. "Question: Who is Kevin Hicks?

"Answer: He is our CFO.

"Question: And how, if at all, do you interact with him?

"Answer: When I pay my haulers, I give the checks to him and he's the signer and the checks -- and he'll give them back to me."

On page 15. "Question: When did you first learn of DBE?

"Answer: When I first got employed.

"Question: So back in 2002?

"Answer: Yes.

"Question: Who told you about DBE?

"Answer: Cora Whitmore told me about DBEs."

On page 16. "Question: Did anybody else talk to you about the DBE program?

"Answer: No.

"Question: Why did you need to know about the DBE program?

"Answer: Because when I first got there, I was taught how to do haulers and some of our haulers are DBEs."

Page 18. "Answer: What we do is, sometimes we will run our Boggs Transport trucks through his company that he allows us to do and so he will come back and pick up a check and he will write our company back a check for the hauling that we have done.

"Question: Explain this to me. You've mentioned that Mr. -- if I understand your answer correctly, you're saying that Mr. John Cuthbertson allowed you to run your Boggs trucks through his entity. What do you mean by that?

"Answer: I mean for a DBE project. One of my project managers told me that the North Carolina job, that it's either a two-to-one ratio or a one-to-one ratio. If Styx had a truck out there, we could use two of our trucks and get credit for it. And to my knowledge the DOT knew about this.

"Question: According to -- what's the source of your information for that?

"Answer: My project manager's name was Greg Tucker.

"Question: Did anybody else tell you that you could do this other than Greg Tucker, a project manager?

"Answer: Nobody else said anything about doing it, but it was always done that way once I got there."

On page 20. "Question: And the only person who told you about it that you recall is --

"Answer: Greg Tucker. He just told me the ratios, how the ratios played out.

"Question: Did you ever have any discussions about this with Kevin Hicks?

"Answer: As far as?

"Question: That type of arrangement, running Boggs trucks through Styx Cuthbertson.

"Answer: The -- oh, yes. I mean, on certain DBE" projects -- "jobs," excuse me, Your Honor. Jobs.

Page 21. "Question: What information do you have from anybody within the Boggs organization that John Cuthbertson can then hire back the prime contractor Boggs to be Mr. Cuthbertson's subcontractor or work along with Mr. Cuthbertson as a subcontractor?

"Answer: I don't have any information on that other than it was done that way when I got there."

Follow-up answer: "Because when I got taught how to do the haulers, because this lady named Lori, and I don't know her last name, but she taught me how to do haulers and the DBEs. Whatever the DBEs were, we would run our trucks through Styx.

"Question: Did you have that discussion with Ms. Coleman or Chapman?

"Answer: No.

"Question: Mr. Hicks?

"Answer: As to why we did it that way?

"Question: Correct.

"Answer: No.

"Question: Mr. Cuthbertson, did you have any discussions with him about that?

"Answer: No.

"Question: Did Mr. Cuthbertson ever appear to you to be a businessman?

"Answer: Yes.

"Question: How so?

"Answer: Because he has his own company and he works. He is a truck driver. He drives trucks and he has his own people that drive his trucks. He's got six trucks. So yes, he appears to be a businessman."

Page 23. Question: -- excuse me, answer in response to a question: "We separate our haulers from subcontractors. Our subcontractors get paid when we get paid, but our haulers we pay every two weeks whether we've been paid or not to keep them running.

"Question: Why is that?

"Answer: That's just how it's always been done. Because as we look at it, a hauler can't go -- because sometimes the DOT, South Carolina and North Carolina, can take three months or more to pay us for a job and our haulers can't go that long without money because they have fuel, payroll, and we've got to have -- we've still got to haul asphalt every day to put down, so we pay our haulers whether we've been paid or not. That's the difference between the hauler and the subcontractor.

"Question: And how are these documents prepared?

"Answer: The haulers are prepared by me. I do the invoicing for haulers."

Continuing -- "Question: Out of all those haulers, including Styx Cuthbertson, who would you estimate did the most hauling?

"Answer: Blue Max."

Page 25. "Question: Do you know who's authorized to certify, sign, and approve documents related to the DBE program?

"Answer: I think -- I'm not real sure on that one because I don't deal with that."

Follow-up answer: "I have done Styx's certified payroll at one point when he worked on a JT Russell job. I have done that. But other than that I have not." This is in reference to preparing DBE paperwork.

Page 29. "Question: Have you ever had authority to sign checks?

"Answer: The only authority I've ever had to sign checks is Styx's checks out of his checkbook.

"Question: You have, however, had permission or authority to sign checks in Styx's name for Styx Cuthbertson, correct?

"Answer: Yes, sir.

"Question: Who provided you that authorization?

"Answer: Styx did.

"Question: Did he ask that of his own or did anybody else in Boggs have some role in having you given the authority to sign for Styx?

"Answer: He did it of his own. Because how that came about, I called him in and I needed him to come and sign paperwork. He said, I'm out driving a truck.' He said, 'You've got my permission to sign my name.'"

This is on page 56, Your Honor, at the bottom. "Question: So do you know how the invoicing between Boggs and Cuthbertson Trucking worked? Who prepares the Styx's invoices to Boggs?

"Answer: I do.

"Question: How do you prepare that? Can you explain the process, please.

"Answer: Yes. We have a uniform invoice that I prepare all of our haulers on and I will put their name at the top, whether it be Styx, Blue Max, so forth. Bill it to Boggs Paving or Buckhorn or CMG, whoever it is, and then I list what job they worked on, what kind of asphalt was hauled, how many hours, what type of truck, whether it was a tri-axle, quad, quint, and then the hourly rate.

"Question: Do you prepare that for everybody? Do you fill everything in for everybody?

"Answer: Yes.

"Question: Who approves or disapproves Styx's invoice for payment?

"Answer: Nobody.

"Question: Why? Because they have already been prepared internally by you?

"Answer: Yes.

"Question: Who reviews your work for accuracy and payment?

"Answer: Nobody."

On page 68. "Question: Explain to me again how this whole concept of running Boggs trucks and how that came about.

"Answer: It had been done that way when I got there and I never questioned it. And I just -- depending on what jobs we got, if he's wrote in as a DBE and he's working on that job, then we'll also put our trucks on that job and we will bill our trucks through Styx.

"Question: Did you run Boggs trucks through any other DBEs?

"Answer: No.

"Question: Did you run Boggs trucks through any other haulers?

"Answer: No.

"Question: And I know you said that that was the practice when you got there, but do you know the reason behind that practice?

"Answer: I do not.

"Question: Nobody ever talked about it?

"Answer: No.

"Question: You never questioned it?

"Answer: No.

"Question: Nobody ever explained it to you?

"Answer: No."

On page 75. "Question: Were you the only person who would know how to run Boggs Transport trucks through Styx?

"Answer: Yes.

"Question: Nobody else had that function in your company?

"Answer: No.

"Question: And you took your direction from Greg Tucker. Anybody else with respect to these types of --

"Answer: No. Actually -- well, I took that from Greg Tucker. But as far as running our trucks through Styx, it had been done like that since I got there. And when I took over there wasn't a whole lot of DBE projects because we've just grown in ten years. But I just looked back to see how things were done and I just kept doing it because it was done that way.

"Question: Let me see if I understand this correctly, though. Did you always get the lead, though, from project managers, including people like Greg Tucker?

"Answer: Yes.

"Question: Did you ever on your own make the decision to run trucks through Styx to get DBE credits?

"Answer: No. Not unless -- well, yes and no. Yes being the fact that if it's a DBE job and I know that we can run our trucks through it and Styx was working on that job, then, yes, I made that decision.

"Question: Did you get approval to do that from anybody or did you do it on your own?

"Answer: I did it on my own because that's how it's been done since I got there.

"Question: That's how you were instructed to do it?

"Answer: Yes."

On page 92, Your Honor. Question -- or "Answer: No. I mean, that's how I understood it. For every DBE truck I thought we could have one of our trucks.

"Question: Why would that be? If you're counting it all as a DBE, why would a Boggs truck be counted just because you have a matching DBE truck? What's the sense of that?

"Answer: That's what I got told from Greg Tucker.

"Question: I understand that's what's been told to you. I'm asking has anybody explained to you why there was this interpretation within Boggs that if we had one minority truck or DBE truck on the job, we could double count that by putting one of our trucks?

"Answer: From what I understand, it comes from the DOT directly.

"Question: Your understanding comes from who? Anybody at the DOT?

"Answer: From my understanding, it come from the DOT to Greg Tucker and Greg Tucker related it to me.

"Question: So your information is Greg Tucker.

"Answer: Yeah, that's my source."

Those are all the excerpts I wanted to read there, Your Honor.

Your Honor, I have a few emails I would like to present to the Court as well.

MR. SAVAGE: Ken, are you going to mark this?

MR. BELL: Yeah, we're trying to figure out what number it is.

Madam court reporter, can you tell us what our next exhibit number would be?

We'll just make one up.

THE COURT: We were pretty low on the exhibit list, but you could jump up to a hundred and something.

MR. BELL: We're pretty comfortable with 9, Your Honor.

THE COURT: All right.

MR. BELL: Your Honor, this is an email string that begins on June 23rd, 2009, from Kristy Lawrence to Kevin Hicks where Kristy Lawrence states, "Styx called me and the DOT is saying we have too many trucks on this job under Styx. They want more DBE haulers running under him rather than our trucks. I want to know what to do about this situation and also if Drew could call Jimmy and see exactly what is going on."

Kevin Hicks replies by forwarding to Drew Boggs, "Is there anything we need to do regarding this?"

Mr. Boggs responds to Mr. Hicks, Kristy Lawrence, and Brad Currin, "We need to make every effort to put more DBE trucks under Styx, HL Henry, et cetera."

Then Brad Currin responds, "Kristy, do we have a list of the minority haulers? I know we have picked up a few trucks that are since the first of the year. Just can't recall them. Just to get this right, if we have three DBE trucks on the job, we can have three Boggs trucks?"

Mr. Boggs responds, "Do either of you know the rule regarding the ratio of non-DBE trucks to DBE trucks allowed?

At one time I thought it was five to one. Thanks."

Mr. Miller replies, "A DBE trucking firm may lease non-DBE trucks at a ratio equal to the same number of trucks being used on a contract by the DBE firm. (It's actually based on dollar value which should be about the same.)"

And Mr. Boggs replies to Kristy Lawrence and Brad Currin, "Here's the rule according to Greg. I say we do the best we can by supplementing with other DBE truckers," et cetera.

THE COURT: Mr. Bell, do you have hard copies of those emails?

MR. BELL: I do, Your Honor.

(Documents were tendered to the Court.)

MR. BELL: Your Honor, the Defendant's Exhibit 11 --

THE COURT: Okay.

MR. BELL: -- which I think I just handed up, this is an email from Ralph Hawkins to Brad Currin copying Drew Boggs, Lee Sanders, Alan Poovey, and Kristy Lawrence, September 15, 2010. "Brad, I've got another special request. Long story short, when this Richland County job was bid, it was assumed Boggs Paving would have the plant set up in Lugoff to service the job. In the bid to meet the DBE requirements, Styx Cuthbertson was written in to haul aggregates from the quarry to the new plant for a total of $19,550. Obviously, the Lugoff plant was yet to be set up. So to meet the DBE goal, we really need Styx and as many minority truckers as you can get on the asphalt hauls. The job has HMA, shoulder widening, patching, and overlay. The job should start the first of October and should only take three to four weeks to complete. Hopefully, all the other jobs that Styx was written in for DBE requirements should be getting close to completion. Alan Poovey is over the job and will be requesting Styx when he orders trucks. We really need your help because the SCDOT is very suspicious of this change. Let me know if there is anything I can do to help. Thanks for your help."

To which Mr. Boggs replies to Ralph Hawkins, "Good clear directions. I wish all would do this. It would make it much easier to meet the goals."

MR. BELL: Your Honor, this would be Defense Exhibit 12.

(The document was tendered to the Court.)

MR. BELL: This is from Lamar Sylvester with North Carolina DOT to Ellis Powell, September 9, 2011. "We've told primes that they need to have in their records a delivery ticket that shows the name of the hauling company, the truck number, the date of delivery, and the type and amount of material. There should also be some invoice that accounts for the cost of the haul for which they are claiming credit. We did not specify any standard form because we wanted them to be able to utilize the tickets that they were already getting for material being delivered."

Mr. Boggs sends this to Kristy Lawrence, Kevin Hicks, Greg Tucker, and Brad Currin. "Please see below and review our tickets to ensure we are in compliance with the requirements of NCDOT. This subject was brought up by NCDOT at our last CAPA meeting as needing improvement across our entire industry."

That's all I would have on that one, Your Honor. And that's all the evidence we offer to put in.

THE COURT: Thank you. Any further evidence from the government?

MS. SUGAR: Yes, Your Honor.

First I'm going to put up Exhibit 13 which is a summary of the exhibits that follow it. But this is just an exhibit showing the number of times that Drew Boggs is personally signing various contracts that include Styx for DBE credit. This isn't just other people signing documents, but this is him. So I'll just -- that's more than a million in signed documents that he did in just an eight-week period or nine-week period. And I can just show some of those.

324. You can see the...

THE COURT: Do you have a hard copy of this?

MS. SUGAR: Do I have a hard copy of this? I don't know that I have a hard copy of all of the contracts.

THE COURT: All right.

MS. SUGAR: I have a hard copy of the summary.

THE COURT: Yeah, that's -- and that's okay. I saw that. I was just going to see about -- if there is anything on here that you want me to read, you'll have to go slower. That's the only problem with these things is when somebody other than me is controlling how fast it's moving, I either -- I either get bored because it moves too slow or I can't read because it's going too fast.

MS. SUGAR: All right. Well, Exhibits 324, 325, 326, 328, 329, 330 are all subcontracts signed between Boggs Paving and Styx Cuthbertson in a short period of time that were all signed by an inked signature of Drew Boggs. I'm happy to flip through those if you'd like.

THE COURT: If you want to. It's your evidence. If you want me to -- if you want me to see either the signature or something specific on the document, you need to let me see it.

MS. SUGAR: This is 324. Drew Boggs' signature.

Going to 325. Drew Boggs' signature.

Going to Exhibit 326. Drew Boggs' signature.

328. Drew Boggs signature.

329. Drew Boggs' signature.

330. Drew Boggs' signature.

Now, what's interesting, one thing we wanted to just summarize to show you is that Drew Boggs was routinely told about problems with the way Styx was used. I'm just going to go through some examples.

This is Exhibit 10. In August 2008, and this is from Exhibit 233, Greg Tucker tells Drew Boggs, "To meet our goals we need to run as many Styx trucks as possible and then match them with the same number of outside non-BTI trucks." It was clear you couldn't run BTI trucks. And what's happening the next week or the next month is payments are still being run through Boggs Transport.

In June 2009, that's when that problem comes up on the JT Russell job, the email the defense showed you. Drew Boggs says, We need to make every effort. But what's happening the next month? The next week. Checks are still being run through Styx Cuthbertson.

December 2009, this is when -- if you'll recall from yesterday, Ralph Hawkins, another one of the project managers, is specifically dealing with DOT who said your report was wrong. Styx was not there. Why did you report $70,000? And Ralph Hawkins works with Drew Boggs to create an answer that says, Sorry, it was done wrong. But what happens after December 2009? It keeps happening. Nothing changes. The reporting is done exactly the same. It wasn't done wrong.

In May 2010, here's Ralph Hawkins gets an email from SCDOT, again, that says you need to give me a list of all the trucks that are there. And Ralph Hawkins is angry and he tells Drew Boggs, Look what they're asking for now. This is all part of Exhibit 10, but the exhibit on that email was 199. And what keeps happening after this? They keep running everything through Styx. Nothing changes.

And in April 2014, a subpoena is issued to Boggs Paving. And you would assume that Drew Boggs knows about it, but we also know that Styx Cuthbertson's sister called Drew Boggs when the FBI came to her office. There's an email that says that. And what happens? Get another small business job, one in Styx's name. All of the money goes to Boggs Paving. And that's Exhibit 46. That's also one of the attachments to the government's leader/organizer enhancement.

And I think if you go back to that -- to the government's filing and you look at that very first attachment, it is an email where Greg Tucker says, "It's a freaking small business contract. Styx can bid I assume?" And Drew Boggs writes back, "10-4." He's going to be the guy who's involved at the small level. He's the over -- he's the CEO. You see him saying, Yes, let's bid the small business job. That's how Styx was viewed, as a commodity. I think that the three exhibits attached to our motion speak for themselves.

Now, we also saw -- and this is going to be part of Government's Exhibit 2, the last page. On this job it's not trucking that's run through Styx Cuthbertson. It's just a check made payable to Boggs Paving back out to make the numbers work. This isn't about the trucking being done wrong. This is about using Styx however necessary to get the numbers on the projects to work. And that isn't the only time that happened.

Put up Exhibit 31.

On this job $98,809 on this Myrtle Beach job is reported as having been done by Styx. But on that job, $76,000 didn't go through Boggs Transport, but it was just again to make the numbers work. It went back to Boggs Paving.

And when you look at the defense numbers, this whole notion that Drew Boggs didn't know the ratio. Well, he didn't need to know the ratio because he wasn't going to follow it. When you look at their report, look at the number of times it's zero. Well, if it's only a ratio, then there's no way that zero -- the zero, the five-to-one ratio or two-to-one ratio or one-to-one ratio is not -- doesn't work when the number is zero.

This process worked because -- I'm sorry, I don't know that I have more exhibits. I have argument, but I can -- I'm not sure I need to put in additional documents, but I'm happy to if you have questions. I have a lot more documents.

I also could talk about some of the evidence. I didn't read in any transcripts. We certainly talked to almost every project manager that worked for Boggs Paving and their testimony was that they didn't decide the amount Styx was written in in the bid. It was decided by either Drew Boggs or Greg Miller.

We interviewed Ralph Hawkins who you saw on some of these emails. He said he specifically talked to Drew Boggs about the problem of how Styx was used and how it made him uncomfortable.

We talked -- you saw Greg Miller, his statement. Drew Boggs is the person who put this in. This is not something that was just Greg Tucker and Kristy Lawrence. We see emails with every project manager with Kristy Lawrence running things through. And I think that that one email on the small business job where Drew Boggs says, Sure, bid on it in Styx's name just shows he was an entity that they could use for any purpose they wanted. That it had to work from the trucking side, it had to work through the accounting side, it had to work on the project management side.

And Greg Tucker was getting things done the way that they were supposed to do, the way they were when he started, which is you write in Styx and the numbers work and that's what he was supposed to do. And whenever he had a problem, he told Drew Boggs about it. He includes Drew Boggs on the emails. He's the supervisor. He's not getting -- Your Honor always talks about the executive and why don't we have the highest up person and where is the supervisor? Why don't we have the leader? And a lot of times it's because on a day-to-day basis their hands might not be as dirty. But what Greg Tucker was doing is the same thing that Arnold Mann was doing. It's the same thing that all the other project managers were doing. And what Kevin Hicks is doing is what had happened before he was there. And what the transport people were doing reports all up to the same person, which is Drew Boggs.

Now, this wasn't about confusion. And this sort of goes back to the loss argument, but I think that that's pertinent. If you look at the last page of Government's Exhibit 1 and you look at what was happening for actual work, payments -- this is just a five-year period. $1.7 million to Styx for actual work. He didn't really get that, but that's the invoices. And 3.5 million for run-through. That's a difference of 1.8 million. Even if Styx was legitimate, even if you could then sub it to prime, which he couldn't, there's still 1.8 million difference. And that's by design. That's how he was. He was a commodity to write in to fill in the gaps.

And the notion that Styx was paid so much money is really a misnomer. Most of this money is deducted out from all of the expenses that are paid. And when you look at Styx's tax returns, he's making maybe 20, maybe 30 grand a year. This is a guy making a trucker's salary. He's not really -- he's not rolling in millions of dollars.

When we look through the emails in the case, you see Drew Boggs is someone who is very far in the weeds. He's analyzing the plant -- the costs on every single job. He's looking at the transport dollars every time. And guess what? The only source of money coming back to transport, basically, besides Boggs Paving, is Styx Cuthbertson. I mean, it's right there in the papers.

He's analyzing the plant haul on every job. I mean, you see emails where he's saying, Why is that trucker stopping for lunch? Lunch deducts. I mean, he is really in the weeds on all these projects. He's the guy deciding how much Styx is put in the bids at the beginning. He's the guy supervising finance which is how the sausage gets made, how the numbers end up working. He's the guy ultimately over transport who is deciding where the trucks go.

And it doesn't make sense that all of the other defendants are going to lie about something when they don't even have a financial interest in the company. It doesn't benefit them personally at all. When there is -- if someone is over extended, you tell DOT. You fix it. You say, Sorry, we signed up this guy and he can't do the work. This is something that was a plan and it worked by every part of the company participating.

The people here are the leaders. That's who we charged. But the other project managers were doing the same thing. The other people in accounting were very well aware of what was going on. But the person at the top is the person who's making the shots, is the person who could stop it every time they're told that something wrong is going on. Because he's the only one who has a profit incentive. Nobody else is getting paid by the job. And it doesn't make sense that there wasn't someone over this, especially when there's so many emails showing that Drew Boggs was involved at every step.

This is not the kind of case where everyone is just committing a fraud and it magically helps only the company, not the individuals. This is not the kind of thing that could happen without the support of the leader.

And I go back to that small business job. Go back to, "It's a freaking small business job, Styx can bid I assume?

"10-4." That's what Drew Boggs says. And a hundred percent of the money goes to Boggs Paving. Zero goes to Styx. He doesn't even get a commission for that. That shows he was something to be used, to be written in to benefit Boggs Paving. And pretty much everyone at the company knew it. And certainly Drew Boggs knew and he was the guy who authorized it and was in charge.

MR. BELL: Your Honor, the real problem in this case was not that Drew Boggs was the organizer, supervisor, manager, leader of the criminal conduct. He certainly was of the company. But the real problem here was nobody was organizing, supervising or managing the DBE program.

If you recall that -- the portions of the transcript from Kristy Lawrence that I read into the record, when she got there in 2002, she was taught by a predecessor administrative person. Here's how you enter the accounting numbers for our haulers, whether they're DBEs or not, whether it's Mr. Styx or not. And she started doing what the lady before her did for years.

And you recall the testimony of Charity Coleman. She said, When I got there, I learned from Wanda Knight who learned from Nancy Bovender who had been there well back into the '90s. You just go into the system, you pull off the check register, and that's the number that goes on the DBE report.

And if you ask either one of them who among these defendants, but certainly up to the level of CEO, who told you to do it that way? Nobody. I mean, it was a lack of supervision that caused the DBE reporting to be so terrible.

And if you think again about the transcript portions that I read of Kristy Lawrence, to the extent she was getting any direction about how to do this and what was being entered, the numbers from which Charity Coleman was pulling for preparation of the DBE reports, it was Greg Tucker who told her what to do. And when Charity Coleman was in here on

Friday testifying about preparing the DBE reports, she said for North Carolina, Greg Tucker and I did that together and looked at them. In fact, we could pull up on the screen state records that show certification of DBE reports by Greg Tucker even though he told this Court under oath he never even saw one.

Nearly all of the projects in question here have to do with Arnold Mann and Greg Tucker as project managers. And there was a complete breakdown in how this was done. The problem was not that Styx was written in too much. And if Mr. Boggs, if he was at these meetings and would fully confess, he would say, Yeah, when we're coming up short, write in Styx Cuthbertson.

It wasn't a problem that he was written into these projects. Your Honor will recall the chart we put up on Friday that showed during this ten-year period, Boggs Paving paid more to Styx Cuthbertson Trucking than they were committed to him to do. So he had the capacity to do the work. Nobody was putting him on the right work. We had Mr. Tucker up here on Friday. A project manager, whether it was Mr. Mann or Mr. Tucker, should have been in better touch with dispatch and said, Make sure that Cuthbertson trucking is getting to the projects where we have DBE commitments. That wasn't being done.

And dispatch, although they had the opportunity because they were provided the information about which DBE goals and projects were we working on, they didn't get them out there.

But Mr. Cuthbertson made more money than was committed to him. So if they had done it right, they could have.

And another reason we know that the DBE reporting was completely messed up, if you look at Defense Exhibit 2, Your Honor, and we put this in on Friday. And this column starts up here with "Required payments to DBEs" and "Amounts paid to DBEs." And if you go down, on these 41 projects, they were required to pay the DBEs roughly $3.8 million; and on these projects they actually paid them $4.368 million. They paid DBEs more than was committed to them for these projects alone.

So if there had been any control, any supervision, any management over the DBE program, they were using DBEs more than was required on these projects. But did they write them in at the beginning correctly? No. Did they track payments to the DBEs correctly? No. Did they report that correctly to the DOTs? No. But it is a lack of supervision, organization, and management that was the cause of this. There was a breakdown from the Charity Coleman side of things to the Kristy Lawrence side of things. The project managers like Arnold Mann and Greg Tucker were not doing their job getting

DBEs on their programs. Kevin Hicks, who was the CFO, could have seen this. We've got a lot more money coming in and going through Styx and that should be reported.

But other than -- and if you listen to the government's evidence and argument in favor of a role enhancement for Mr. Boggs, about 80 percent of the questions to the witnesses and the argument is everybody reported up to Mr. Boggs. Yes, as an organizational basis on this business, that's true.

But with respect to Mr. Boggs knowing that Charity Coleman was pulling the wrong number out of the accounting system and that Kristy Lawrence was entering a number that wasn't net of the money that went from Mr. Cuthbertson to Boggs Transport, there isn't any evidence of that.

Now, Mr. Tucker said a few things, but, frankly, Your Honor, Mr. Tucker on Friday testified falsely at least three times in this Court's presence with respect to that supposed drain pipe work in Myrtle Beach which there is no committal sheet for.

With respect -- when he said, I never even saw a DBE report, although Charity Coleman told us, We sat there and did them together. And in the state's own records he's certifying them.

And then with those false invoices which he said, Yes, I submitted these invoices to South Carolina DOT. I got them from Kristy Lawrence. They're clearly not the invoices Kristy Lawrence routinely prepared for everybody.

So I would ask the Court not to put a whole lot of stock in what Mr. Tucker said on Friday.

Mr. Boggs was the organizer, supervisor, manager, and leader of this company, but not this conduct. I don't think anybody was. It was a lack of organization and leadership that led to this. They could have done this properly and they didn't and for that they're guilty. But they overpaid DBEs on those projects and they paid more money to Mr. Cuthbertson than was committed to over this time. That does not show a managerial, supervisory effort to commit this crime by Mr. Boggs.

THE COURT: All right. On the issue of role in the offense, there are -- there are more victims than just -- although the government entities are the ones that are listed here and the loss tables involved really only go to governmental losses and are inadequate in many, many ways in helping this Court come to a decision in this case.

It's clear that the DBE program was -- was being either ignored or manipulated in a way by Boggs Paving in order to gain these contracts. And other DBEs may have been -- other so-called legitimate DBEs could have been -- could have gotten work. Cuthbertson could have been a DBE on his own. I think the program is -- the program was set up --

it's set up with lofty goals. It's to try to help small companies be able to get some work, disadvantaged business entities, is what it's supposed to do. So that is a -- that's a good goal to do that. Whether that is adequately done, whether that is properly done operated by the Department of Transportation, whether these programs across government -- the government are operated correctly is not something the Court needs to get -- needs to get -- spend too much time on today.

The primary thing the Court needs to do is what happened in this case? What may have defeated the proper use of the program and other legitimate companies getting in? It would be good, you know, if everybody could get a small loan of a million dollars from somebody, they could start off with -- and might make success in this company. But there are so many people who are born on third base that act like they hit the triple, it's hard to get going in this world. And the idea is to -- of the DBE program is to help smaller people compete with the big guys and keep the big guys from doing it themselves. And it appears that -- it appears that Boggs Paving was -- was using Cuthbertson as its own, like an employee and able to control him to a large extent.

Probably -- you're probably right, Mr. Bell. It's probably true that there's a lot of control exercised by the big companies over the small haulers. That's probably very much true.

And it's probably true that Boggs liked the fact that Cuthbertson showed up. I mean, after having brick done on my house, I thought I just need to come up with a brick company that says -- with the motto, We will show up, and they -- I might get all the business because every time I paid them, they didn't come back for a while. They did great work when they were there, but they didn't come back for a while. So you want people that are good. You want people to do the work. So they have done that.

But in this case, for better or for worse, whatever the losses are, whatever everything else is, it would appear that Drew Boggs as the leader of this was aware, based on all of the evidence, that the DBE program was being played with fast and loose and he was the manager and supervisor of this company. And therefore, the Court will put the role in the offense as is suggested at -- with an additional four points for a role in the offense as a manager and supervisor.

All right. Now, let's get into the talk about the -- where we go with the loss. This case has really -- and I want to hear arguments on that. I want to hear *Nagle* argument. I want to hear, you know, what the arguments are.

I look at what's recommended in here. And, of course, probation bases a lot of the information that it gets on -- from the government in these cases. I mean, there's nothing wrong with that. They want to get -- they want to try to get as much information as they can.

For instance, on Boggs Paving, they're using the government's talk about the -- the loss being 87.6 million. And then they're going to multiply that and they say the fine range based on all of that is 122,650,000 to 245,280,000 based on that being the loss. They don't ask that the ground be salted so nothing ever grows there again, but they do -- that's pretty high up on the list. And it's not even anywhere close to what the government is asking in terms of sentencing.

In other words, when the government gets down to sentencing, the government -- the government is saying that -- in recognition of the fact that the fraud involved the trucking aspect of it which was somewhere in the $3 million range, the government recommends a sentence that probably would be at a -- at a level 25 when it recommends 60 months when everything is said and done, the government recognizing that if we just go with all of these numbers, it overstates the harm. It overstates everything in the case.

When you hear about, you know, $84 million or $87 million, it does -- it does cause you to perk up a little bit. Did the government lose 80 some million dollars? Well, no, but that was what -- that was sort of the carrot that was out there that caused the DBE to be used in the way that it is. It's almost as if that was sort of a throw away. Let's go -- we can handle the DBE stuff. Let's just get the contract. Let's make the bid. And that's really not the way that it's supposed to be done.

I mean, Mr. -- I don't think -- I don't get the impression Mr. Cuthbertson was operating -- had a trucking company over all these years that he continued to build and operate and buy more trucks and be able to do more jobs, which is really what the DBE program is meant to do. It was -- he existed for the service of Boggs Paving. And by doing that, it defeated -- it defeated the DBE program.

Now, what are we going to do about loss? So let me hear from you all on what the loss ought to be talking about *Nagle*. Because really and truly, coming up with a guideline range is an academic exercise. What the sentence ought to be is based upon 18, United States Code, Section 3553 and the factors therein. Regardless of what the range is in the case, the Court hearing -- seeing what the government thinks with all of these numbers and what the defendant thinks, there is certainly a range between zero and five years because that's what -- the government is asking for no more than five years. It's asking for five years for Mr. Boggs. It's asking for probation for some others.

And so although there is no existing guideline range in this book that's that wide, under the 3553 factors, the Court does certainly have a target range that it is to consider and what the correct sentence on this ought to be.

But first, before we get into the 3553 factors which will run sentencing in this case and what ought to be in this case, this particular case under these facts with these defendants, we got to come up with a loss and we got to come up with a correct calculation, not the calculation that I want and not the calculation that the government wants and not the calculation that the defendant wants, the calculation that is correct. And so talk to me about what it ought to be.

Let me hear from the defense first from the standpoint that the government has convinced the probation office that the -- as they do in 99.99 percent of the time, that the loss ought to be at the high end. So because of that, it goes -- it's incumbent upon you to tell me why it shouldn't be that way.

MR. BELL: All right. Well --

THE COURT: And let's talk -- let's talk generally what the guidelines say the new -- the new provision of the guidelines that came into effect that gives credit for -- and I'm not sure that's what it ought to do, but gives credit for the actual expenses that someone puts in. In other words, what you got for what you did and the actual expenses that were expended by the company and gives credit for it and where it ought to fall.

MR. BELL: Well, we have to start with the *Ohio*

Brothers case from the Fourth Circuit, obviously, because that's controlling authority here. And although the credit provision was not in the guidelines at the time *Ohio Brothers* was decided, there are two points from that case that still do control.

One, this is a government benefits case because DBE fraud is considered government benefits. So it's not the usual, actual or intended loss.

THE COURT: Which is good for you.

MR. BELL: It is.

THE COURT: Because if it was not a benefits case and it was a fraudulent procurement case, then the guidelines would not -- the Court wouldn't have to wrestle with this.

MR. BELL: Right, it could be different. So it's a government benefits case that's still good law in the Fourth Circuit from the *Ohio Brothers*.

The other part of *Ohio Brothers* that's still good law is contrary to the presentence report and the position of the government, the Court does not look at the total value of the prime contracts. In *Ohio Brothers*, those facts were exactly like this. There was a prime contractor who got a $5 million contract, more or less, rough numbers, and had about $150,000 DBE contract under that against which fraud was committed. And the DBE contractor only got about, I don't know what it was, 12 or 20 thousand.

And the Fourth Circuit when it started its loss calculation looked at the DBE subcontractor and took from that the amount that was actually paid to the DBE and considered the difference the loss amount. Now, that's what the Fourth Circuit did in *Ohio Brothers* and what the Court should do here, which is how much was committed to Mr. Cuthbertson and how much was he paid, and that difference is the loss amount. Except now under the revised guidelines, the Court should look at credit for the cost of services and goods provided because I actually think that is the right thing. We've been defrauded, although we got tens of millions of dollars worth of roads. You have to take that into account.

What we did in our sentencing memorandum, Your Honor, is we looked at the difference between what was committed to Mr. Cuthbertson and what was paid, and that came up to 700 some thousand dollars or something like that. And then we gave the Court some industry studies, which is the best information we have about what is the -- when you look at it in terms of profit margin, which is really nothing more than the difference between goods and services and then what's left over. And if you take that percentage against what should have gone to Mr. Cuthbertson and assume that the rest is the cost of goods for services provided, the correct loss calculation in this case is about $37,000.

So if you follow what -- obviously, the Court has to and will follow with respect to the *Ohio Brothers*, and then consider the, what I would say, obviously, is the very well reasoned, thoughtful case from the Third Circuit in *Nagle* about application of credits for cost of goods and services sold, that number turns out to be whatever it turns out to be, and in this case it's $37,000.

I understand, because you've said it many times, you're going to impose the sentence you think is the right sentence with respect to all of these defendants, but that's the correct guidelines calculation.

THE COURT: All right. Let me hear from the government. First let me hear -- any other defense attorneys for any of the other defendants want to be heard on loss amount?

(No response.)

THE COURT: All right. I'm seeing no hands. I'm not going to go through one by one. Jump up.

Let the record show that after a significant pause, no defense attorney rose to address the Court with regard to this.

All right. Let's go ahead and hear from the government.

MS. SUGAR: Thank you.

First with regard to *Ohio Brothers*, I disagree that the facts are, as Mr. Bell says, similar to this case. There was a prime contractor, there was a fake DBE, and there was a real DBE. And the prime contractor was aware of what was going on and allowed it to happen. And that was a different factual scenario from here where the goal wasn't to let's get more trucking. The goal was to let's get these big contracts. So I think that contrast is important and it's important in getting the guidelines right. What was the goal, what were the benefits that were obtained improperly? If you lie to get a contract, then it's the full value of the contract.

But nevertheless, we do think that that's too high which is why we've come down to the amount that was written in -- that was reported fraudulently as having been performed as a -- the 3.7 --

THE COURT: That's not anywhere close to the contract. I mean, the number --

MS. SUGAR: No, no. This is 3.7 million. That's what they reported on the 87 million.

THE COURT: The government has come down.

MS. SUGAR: Yes.

THE COURT: And on its recommendation it thinks that instead of 84 million, that the benefit obtained is 3.7 million. And that -- that even is too high and then the government is recommending a variance down to, I think you're asking for 50 months for --

MS. SUGAR: We have agreed --

THE COURT: -- I mean 60 months for Mr. --

MS. SUGAR: We have agreed to recommend no more than 60 months.

THE COURT: No more than 60 months.

MS. SUGAR: It's not binding, but we have come down from where with the four points and the two-point enhancement. So, yes, we have gone below that. I think Mr. Miller suggests it's an additional three levels, which meant an additional three levels beyond.

So we recognize that we need to exercise caution. But first we're dealing with getting the guideline calculation right. That's what we're talking about now.

So going back to that, you know, *Nagle* is the most recent case. That doesn't make it the only case and that doesn't make it the right case here.

For the government -- the government benefits falls within the special rules. So if we then ignore the special rules all together and then start over at the beginning, it doesn't make sense for us to even have those special rules.

You saw in the procurement fraud they actually -- they make it a little bit more clear. But in the *Martin* case the Ninth Circuit also decided this year, they said if this were a government benefits case, then we wouldn't -- we wouldn't reduce it by this amount. So there's certainly not only one ruling out there on how to do this. And the Sixth

Circuit said DBE fraud is government procurement so you don't reduce. So there's a lot of different ways things happen.

But when we're doing the math at that point, we can't -- we cannot come up with a number other than 3.7 million of the harm because the roads were built. We've said that all along. So if the roads were built, what's the harm? Well, I believe from the testimony of the DBE witness, it would -- the harm could be looked at by the 3.7 million that didn't go as it was supposed to.

But if you can't determine the loss, then we would again -- one of the other options you have if you were using the rest of the loss guidelines, which I don't think you need to. I think you stick with just government benefits, then you can look at profit. And Your Honor saw -- we put in evidence that even though the low -- the lowest paving company by 2013 when it had fallen to the bottom was the 2 percent. And I think you could look there if you wanted to determine where to go. And there's a Southern District of New York case that talks about the profit as being a place you can go.

Now, I don't think you need to because I don't think you need -- I think that the -- there's an unpublished Fourth Circuit case that says in special rules cases, we don't know why you would have to apply this special provision that they apply in *Nagle*. But -- and *Nagle* is certainly different than the *Martin* case in the Ninth Circuit. It's not controlling in the Fourth Circuit. And I don't know that it follows or makes sense that in a special case you should just go back and ignore all the special rules and then start over at the beginning of the loss calculation.

So we have a couple of alternative numbers. We think that the profit is in the same range as that 3.7 million.

Or even if you just use the 2 percent of the 87 million, I think it knocks it down two additional levels.

We also have the money laundering which was approximately 7 million also in that same range.

So there's a number of ways to get to that range and we're trying to look at the harm and find a range that's going to go there.

Now, even if you go there, we've already --

THE COURT: See, that's what I -- what I don't want to do is try to find the harm necessarily.

MS. SUGAR: Right.

THE COURT: I mean, the harm is the integrity of the program.

MS. SUGAR: Correct.

THE COURT: The Court has said the integrity of the program has been harmed. And if there is not something done in order to keep -- in order to cause others to consider not committing this kind of fraud, then it's not going to happen.

That's the harm.

But the question is -- in other words, the guideline -- the guideline range based on what the loss ought to be is not -- should not be based on trying to figure out what sentence ought to be given for the harm in this thing. This is deeper than the money.

MS. SUGAR: Right.

THE COURT: Just the money that was made. And there is profit. They went into that for profit for that.

And I have another question is, should the -- you know, should they get -- should there be credit given for expenses which go to salaries to the people? And, of course, nobody has offered what the salaries of the company or what Mr. Boggs might have made. But it seems -- it seems bad that you ought to be -- you can make any company nonprofitable by the salaries.

I know the -- the *Charlotte Observer*, you know, reports on -- keeps us up to date on what Carolinas Medical is doing and 35 -- what is it? Twenty-five people who are not giving patient care make $35 million. If you spend that kind of money, you can be a nonprofit on salaries for the people and the money out there. You know, you can keep going. You know, hospitals -- hospitals become nonprofit only because they pay it out --

MS. SUGAR: Sure --

THE COURT: -- in big money salaries and things like that.

MS. SUGAR: And I think the profit analysis has that inherent flaw in it is that you could be a lucky loser if you're a less -- if you're a less well run company, you'll have a lower profit on the same amount of fraud as the company that's more efficient.

THE COURT: But I didn't make the guidelines.

MS. SUGAR: Right.

THE COURT: In other words, I think the guidelines -- you know, sometimes -- most of the time you have defense attorneys running to the sentencing commission and saying the guidelines are too high for something. There's a question of are they too low in this situation? Why give them credit in this case? You know, is this a -- if it's a benefits case, it says you're supposed to give credit, not because you think it ought to be under the fraud guideline. I do think it probably should have not been given in this case. The question is, is that where it goes? The Court understands that. The Court sees that this case is going to be sentenced somewhere between zero and five years because the government thinks the highest sentence in this case should go to Mr. Boggs for five years, or at least not greater than five years.

MS. SUGAR: Not greater than five years.

THE COURT: Not greater than five years. You may recommend something else. The -- and then everybody else cascades down from that all the way down to probation. So I recognize where the government, which is -- thinks this case ought to go. The defense thinks it ought to go in that range and they think it ought to go into everybody goes home.

MS. SUGAR: Yes, Your Honor.

THE COURT: I mean, that's what they think.

MS. SUGAR: Well, *Nagle* itself -- I mean, the problem is it's been remanded so we don't even know what the district court is going to do for loss in that case because the Court specifically says you should keep in mind the goals of the DBE program in fashioning your loss.

THE COURT: But they don't say you -- not in fashioning what the loss is, in fashioning what the sentence is. In other words, in *Nagle* they found a very low sentence. A very low -- they found, I think it was zero. And then in the concurring opinion, Judge Hardiman said that --

MS. SUGAR: It wasn't a government benefits.

THE COURT: It was talking about fraudulent procurement and false statements to the government. And it said that sentencing guidelines make it clear that the loss calculation in the procurement fraud case is covered by the general rule. And he would -- he would not -- he would find a greater loss than the majority did. The majority sent it back finding the loss to be -- to be low.

And what -- what this creates is if it's a benefits case, it creates a situation where the Court is sitting here going, well, what kind of deductions are there? You know, do you deduct for the salary? What are the salaries?

I mean, the Court is going through an impossible math calculation trying to figure this out if they're supposed to get credit for their costs, which it appears, based upon the guideline range, they may be entitled to get credit for their costs.

MS. SUGAR: And if that's true and if --

THE COURT: As silly as that may seem at this moment.

MS. SUGAR: Well, as I said, the testimony of the DBE person from North Carolina is that -- and the plain language of the contracts, as we said in the loss, if you're cheating on DBE amount, you could lose the ability to bid. You could have to give back all of that money. So I think it is a fair way to say --

THE COURT: But that -- and those are additional penalties. I mean, you can -- you know, you can try to get the money back. Apparently they're not going to be allowed to bid on contracts and -- I mean, there are some significant things that occur and that are occurring with regard to the DBE contracts. But what does that do with the loss amount in this case? That's the -- that's where the Court is struggling with this case. And I really have struggled with this case. The amount of times I've tried to do math on figuring out -- I've tried to figure out what salary -- what kind of salaries are made because that would seem to me to be a ridiculous thing to allow somebody to take their salaries out that Mr. Boggs made off of the $3 million part.

MR. BELL: I just rose to plug in the answer to a couple of questions Your Honor has raised.

During the indictment period, Mr. Drew Boggs and his brother Chris Boggs, who own half the company each, were drawing $125,000 a year, not pulling out millions and millions and millions.

And to answer another question the Court has raised about profit. You recall we put up our summary witness yesterday who analyzed Boggs Paving profit and loss on these projects, and she did factor in a percentage, like 2-1/2 percent or something, of supervisory costs which was for people supervising that project, not Mr. Boggs, not Mr. Hicks, not Mr. Miller. You know, the foreman or the superintendent who was on there.

So the profit to the company of this conduct was $94,000. And Mr. Boggs nor his brother, who hadn't done anything wrong in this case, were not pulling out the big bucks so it would skew that number.

THE COURT: Well, somehow he was -- he's been able to over the period of time on these -- and this is a big contract, accumulate a great amount of wealth. So there's -- and some of it, I guess, is in the company which may or may not be around, but he's accumulated a good bit of money over the time. So it can't be -- it can't be off of -- off of a $125,000 a year salary on its own. While that may seem like a lot of money to a waitress after they pay taxes on that, not many $125,000 a year people are making -- are socking away millions of dollars in net worth.

MS. SUGAR: Your Honor, the government presented testimony about the total amount of commissions that they saw going to Styx. So for money just run through that he got for the scheme is $80,000. So it seems absurd that that's the total amount that Boggs Paving was making. They had to be making a --

THE COURT: At a lot of businesses, though, the employees make -- the employees end up making a lot of money and more money than -- sometimes than the company makes in the end. You know, it can be -- my family ran a business and I remember Dad one year said, The employees did a lot better than we did this year up there at our ranch. So it's -- you know, that -- yeah, it can happen that way if you're running an unintentional nonprofit business. But this -- I understand what the government is arguing here. I've got to come up with the right answer.

MS. SUGAR: Yes, Your Honor.

THE COURT: And then I've got to come up with the right sentence.

MS. SUGAR: Well, I do think if you can't find a number, then the guidelines say that you can look at the profit, and I think that 2 percent is a fair way to do that. I also think you can make alternative findings that it's 3.7 million. Or if it's zero, then you would depart up to that amount. I mean, there's a lot of things the Court can do to end up with the right range. You can make alternative findings.

THE COURT: Or I can make -- I can make the correct finding and then sentence at the right sentence.

MS. SUGAR: Yes, Your Honor.

THE COURT: I mean, that's what I can do. I mean --

MS. SUGAR: That's what all the parties want.

THE COURT: -- we're straining over a range here and we should -- we should strain. But in the end, it's going to be very difficult. It's not an easy thing in this case because of the decision of the sentencing commission to add on this for benefits. And, you know, you can sit around and think about why they would do that, but it's probably because of something like a food stamp case where some poor devil ended up going off on -- getting some big sentence and then given a bunch of -- some of this back. And they said, you know, we can't do that. Unintended consequences.

But it's very difficult to -- unless I ignore that this is a benefits case. If I ignore this is a benefits case, I can do some other things.

But regardless of what I do, if I find the guideline range is 360 months to life, the government has come in and said the top sentence ought to be no more than five years. So I'm straining an awful lot over something that may or may not have a lot of implication in this case.

MS. SUGAR: Yes. We do not agree that the loss is zero. We don't agree that the loss is less than a hundred thousand dollars. This is a case where the small business jobs they got in Styx's name were more than a hundred thousand dollars. That would be an absurd result to have a loss that is so low when you're talking about tens of millions of dollars worth of contracts.

THE COURT: And that's what *Nagle* was talking about. *Nagle* talked about the fact that this is a serious blow to the DBE business. If the DBE business is done right by the -- by the disadvantaged business people, if it's a real company and not a company that's added somebody to be a DBE, but if it's a real DBE and if the folks at the Department of Transportation, GSA, or whatever, are looking at that and making sure it's a real DBE, then this is a good program. This is a good thing.

And it's been damaged --

MS. SUGAR: Yes, sir.

THE COURT: -- by the fact that this has been mismanaged. But we can't -- we can't calculate -- that's not one of the losses that we calculate. That's not in this -- in this system to calculate.

MS. SUGAR: I think it is. I think it's to be calculated in the harm. You might not put a dollar amount --

THE COURT: But not in the money. I mean, in the amount of harm, the fact that DBE has been done wrong and that people need to be discouraged from getting these kinds of contracts. When this case is over with, really what happens, if the fines are big, if really Boggs Paving goes out of business like they claim they are, if Boggs Paving and their people are no longer allowed to bid, there are going to be a lot of people who are going to go, I don't want any of that. Let's go ahead and figure out how to do this DBE right. And that's what needs to happen in this case. That's a big thing that needs to happen in this case.

There may be need for some of these people to go to prison for a while too in order to give meaning to the law. But there's some good -- the government has done some good here in bringing this case. But I have to come up with what the right sentence is here and I can't -- I can't decide what the right sentence is and then try to figure out how to get to it by coming up with some invented guideline.

MS. SUGAR: We're trying to give you different options --

THE COURT: I know.

MS. SUGAR: -- to get to the right place.

THE COURT: I know. But if I -- one of the things it says is that if you can't come up with the right number, you can go to the -- you could go to the money laundering guideline, which is -- which is up there pretty good. The Court considered that. The problem is that even in the Court's consideration and math of this as to how to figure out to give full credit for the money, the money is lower, the money the Court would come up with is going to be lower than any guideline on the money laundering. So it would be unfair to go up to a higher guideline because I'm having trouble getting it right on a specific lower guideline. I can't exactly decide which of the lower numbers I ought to use so, bingo, I jump to a higher guideline. That wouldn't be a fair way to do it. And I did consider that. I've considered the money laundering guideline.

MS. SUGAR: I think that you can --

THE COURT: But that guideline is even higher than what you're asking for.

MS. SUGAR: You could -- you could use the money laundering guidelines and then say that it overstates the loss and come down. I mean, you have a lot of options here. We need to calculate the guidelines correctly. We could do them in the alternative if there was concern about doing it right because I think everyone wants to get to the right place.

THE COURT: There's a lot of concern about doing it right. The real reason that the people -- the real thing they're trying to do when they go through the vetting process for people for these jobs, each political side knows they're not going to get the exact person that they want on the job. They want somebody that will follow the law. That's all they want. They don't want -- they don't want some idealogue up here that's going to look outside the United States Constitution or the laws of the United States to try to find the right. They want somebody that will follow the law that's in front of them. And that's what everybody is trying to do when they get -- when they put people in these positions.

So I want to get it right, is really what I want to do, whether I like it or not. And that doesn't mean that I will get it right, by the way. I may get it wrong.

Okay. Any other arguments from anybody right now before I take a quick recess and think about this another minute or two? This has given the Court a lot of trouble in terms of coming up with the right guideline.

MR. BELL: I can't help but repeat myself, Your Honor, since you invited it. That, you know, we spent a lot of time looking at the appropriate loss calculations --

THE COURT: And came up, surprisingly, that they ought to be really low.

MR. BELL: Well, we were hoping the numbers would work out the way they did. But much like the Court did, because I knew the Court would do what it thought was correct under the law, that's the methodology I used. He's going to follow the law where those numbers go. And all I can tell the Court is I'm pretty confident that the argument we've made is the right one.

THE COURT: All right. Let's take a 15 minute recess.

(Brief recess at 10:25 a.m. Court resumed at 11::04 a.m.)

THE COURT: All right. As to amount of loss. Well, this is a serious matter. The DBE program is a -- or Disadvantaged Business Enterprise program is an affirmative action program aimed at giving exclusive opportunities to certain women and minority business, and was found by the Fourth Circuit as such in the Brothers *Construction Company of Ohio* case to be a government benefits program.

The program cares about who performs the work. It assumes the performance of the contract allows a disadvantaged business enterprise to not only earn a profit on the deal, but also to form connections with suppliers, labor and others in the industry. The profit earned, therefore, is not the only benefit the DBE obtains when it receives the contract, and that has been thwarted by what has occurred in this case. And it's easy to see why deducting the direct costs of the amount -- from the amount of the loss would understate the seriousness of the offense.

But the problem in the case is that the remedy is not to concoct a number in determining what the seriousness of the harm -- of the harm in this case is in terms of the loss. The -- there are two -- there are two types of harms which can occur. There is a monetary harm and then there is a programmable harm. And the DBE program has been harmed and the Court will take that into consideration with regard to sentencing.

However, after much thought, the Court finds that the loss in this case, provable loss in this case is $37,000. Roads were built. The government got the benefit out of it. In fact, the government's not even asking for a dime of restitution in this case. It -- it is a very serious, serious matter, but that -- the seriousness of this matter is -- can't be monetized. It's just not one of those situations that can be under the prevailing law.

The Court agrees with the government that the *Brothers Construction of Ohio* case is the controlling law and the Court has been guided throughout the loss phase of sentencing by that decision. The only difficulty in following *Brothers Construction* comes when application note 3(E)(i) is considered. As recently pointed out by the Third Circuit in *United States versus Nagle*, which also discussed *Brothers Construction*, while Section 2(F)(i) had an application note similar to Application Note 3(F)(ii), it had no application note similar to Application Note 3(E)(i), which mandates a credit for the fair market value of the property returned and the services rendered.

The government certainly wants to argue, as it did in *Nagle*, that Note 3(E)(i) has no application to loss determined under 3(F)(ii). However, as the *Nagle* court found, the sentencing commission knows how to tell courts not to apply 3(E)(i) credits as it did in the very same Subsection, 3(F)(v), when it advised as to "Certain Other Unlawful Misrepresentation Schemes" that "no credit is provided for the value of those items or services."

Finally, Note 3(F)(ii) only supplants Note 3(A) in the calculation of loss as 3(F) only states "Notwithstanding Subdivision A." Had the sentencing commission intended to preclude crediting services rendered against loss for Note 3(F)(ii), it would have used similar language as it used in Note 3(F)(v) or included in 3(E) in the "notwithstanding" preamble to Note 3(F).

So that's going to be the Court's finding with regard to the loss. But the Court notes that the harm done here was serious and the Court takes this as a serious matter and will sentence this as a serious case, noting that really where the parties disagree is on the government saying that it will recommend a sentence not greater than 60 months for defendants going down, depending on who the defendant is, and the defendant saying please send us all home on probation. And somewhere in between all of those things, depending on the defendant, is the right of this matter. So the Court will hear with regard to that on the sentencing questions.

Is there anything else in front of the Court right now?

MS. SUGAR: Your Honor, the government would object for the record to the loss calculation.

THE COURT: Certainly. And the government is welcome to -- who knows what the Fourth Circuit will do. The Fourth Circuit has said this is a benefits case, and if this is a benefits case they get it all. Looks to me like it could have been considered or maybe should have been considered fraudulent procurement. But it's the Fourth Circuit that put it as a benefits case, not this Court. And I can't make it up as I go along. I'm just following the law of the Fourth Circuit. When that changes, I'll change.

All right. Let's move on to sentencing. What order are we going to be sentencing these folks in now? I think we were going to go -- we've got a batting order that we decided on. What's the first one?

MS. SUGAR: From the bottom to the top.

THE COURT: So which one do you want to call?

MS. SUGAR: Mr. Cuthbertson is the first on the schedule, Your Honor.

If we could just have quickly Mr. -- probation tell us the guideline range that would be applicable as to each defendant based on the enhancements that apply and the new loss amount.

THE COURT: Yeah, it looks to me like -- that's what we tried to talk about back there. And it looks like it's going to fall somewhere in the neighborhood of...

MR. BAKER: Your Honor, most individuals, because of the change in loss, would be right at 8 as the total offense level when you make the adjustments.

THE COURT: Right.

MR. BAKER: Except for the ones with money laundering and that would be 10, I believe. In Mr. Boggs' case with leadership, that would be 14.

THE COURT: So Boggs would be 14. And it's going to go -- all of these cases I'm going to listen to the government with regard to the actual harm to the program because the Court certainly has the ability to vary up as much as it has the ability to vary down depending on the harm caused by the particular defendant in the case.

All right. Call the case of United States versus John Cuthbertson.

Is the defendant ready?

MR. ASHMORE: Defendant is ready.

THE COURT: Is the government ready?

MS. SUGAR: Yes, Your Honor.

THE COURT: All right. If the defendant would please stand.

Mr. Cuthbertson, do you recall appearing before a United States magistrate judge for the purpose of entering a plea of guilty in this case?

THE DEFENDANT: Yes.

THE COURT: And, Mr. Cuthbertson, there's not -- there are no trick questions in this. These are just direct questions to attempt to find out and make sure that your plea was knowingly and voluntarily made. Okay.

So do you remember being placed under oath the day you entered a plea of guilty in front of the magistrate judge?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you remember answering the questions of the judge that day?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: Do you remember that there was a plea transcript form where the answers to the questions were checked off? Do you remember signing that form indicating that the answers you gave that day to the judge were true and accurate to the best of your knowledge?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: If I were to ask you those same questions today, would your answers be the same?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: All right. Thank you.

Counsel, do you believe your client understood fully the questions that the magistrate judge asked at the Rule 11 hearing?

MR. ASHMORE: Yes, Your Honor.

THE COURT: Thank you.

Mr. Cuthbertson, did you answer the questions the way you did and are you going forward with your guilty plea today because you did commit the crime you're pleading guilty to?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: All right. Then based upon those representations and the answers given by the defendant at the Rule 11 hearing before the magistrate judge and affirmed again in open court today, the Court affirms the judge's finding that the defendant's plea was knowingly and voluntarily made. The Court also affirms the judge's finding that the defendant understood the charges, the potential penalties, and the consequences of his plea. Accordingly, the Court affirms the magistrate judge's acceptance of the defendant's plea of guilty at the Rule 11 hearing and accepts it itself today.

Ms. Sugar, would the government have a factual basis in this case?

MS. SUGAR: Your Honor, the parties have filed a factual basis in this case which has been adopted in the presentence report.

THE COURT: All right. Thank you.

Does the defendant stipulate that the factual basis which is found in the presentence report can be relied upon by the Court in finding a factual basis in the case?

MR. ASHMORE: Yes, Your Honor.

THE COURT: Thank you. Based upon that stipulation and the offense conduct as set forth in the presentence report, the defendant's plea of guilty before the magistrate judge, and the defendant's admissions in open court today, the Court finds there is a factual basis for the entry of the plea of guilty and enters a verdict and judgment of guilty in this case.

Mr. Cuthbertson, your case was referred to the United States Probation Office for a presentence investigation and the preparation of a presentence report. The Court has now received that report. Have you either read or gone over that report or had it read to you?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: Have you gone over that report with your attorney?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: You have?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: Okay. Do you now believe you understand the contents of that report?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: All right. Counsel, have you had an opportunity to go over that report with your client and are you satisfied he understands the contents of that report?

MR. ASHMORE: Yes, Your Honor.

THE COURT: All right. Thank you. Are there any objections to the presentence report which remain outstanding at this time?

MR. ASHMORE: Your Honor, in view of your ruling on the amount of loss, we have no objections.

THE COURT: All right. Any objections from the defendant -- from the government other than its objection with regard to the Court's finding on amount of loss?

MS. SUGAR: No, Your Honor.

THE COURT: Thank you. Then the Court, except for -- will adopt the information contained in the presentence report for the purpose of applying the guidelines as has been amended by the finding of its -- of loss in this particular case by the Court today.

In the instant case, it would appear that we have -- what's going to be the total offense level for this defendant now?

MR. BAKER: Eight, Your Honor.

THE COURT: Eight. Thank you. And a criminal history category of I, which puts him in the 0 to 6 month range.

Does the defense agree?

MR. ASHMORE: Yes, Your Honor.

THE COURT: Does the government agree that that is the sentencing guideline range in this particular case based upon the Court's finding of loss?

MS. SUGAR: Yes, Your Honor.

THE COURT: All right. Thank you.

All right. Are there any motions from the government for departures or variances at this time?

MS. SUGAR: No, Your Honor.

THE COURT: All right. From the defense?

MR. ASHMORE: Your Honor, I did file a motion for variance; but again, considering your ruling on the amount of loss, I think that's essentially turned into a mitigating circumstance argument.

THE COURT: All right. Okay. You can make whatever argument you want to make in terms of punishment when the time -- when the time comes.

Let me hear -- in this particular case, let me hear from the government first on this in terms of what the punishment ought to be in this case before I hear from the defense and defense counsel.

MS. SUGAR: Thank you, Your Honor.

Well, the guideline range diminishes this a little bit, but I do think that for the prosecution team, that Mr. Cuthbertson was sort of the hardest case. You know, we wanted to find a way that he wouldn't be included in the indictment, and we couldn't make it happen, because in so many ways he was taken advantage of. He trusted Drew Boggs. He trusted his father before him to, you know, take care of everything. He signed whatever was in front of him. He was a simple trucker, not necessarily the most intellectual guy in the room, and he trusted them and he made very little money.

And I think that was an interesting thing that we found out during the investigation is when people even who worked at Boggs Paving found out how little Mr. Cuthbertson made for all these false signatures, they were surprised. They thought he would have made a lot more money. And indeed, we've seen cases where the, you know, sort of DBE nominee that we see here would get a lot more money.

THE COURT: This is why the DBE program was formed was to avoid people like Mr. Cuthbertson being employees forever unable to make anything above wage.

MS. SUGAR: Sure. And we saw him not grow. We saw him making, you know, exactly what a truck driver would make the whole time of this scheme. We don't see him advancing. We don't see him getting more money. And all of those things really counseled for a low sentence.

But at the same time, there was a number of problems with just giving him a walk because it wasn't just that he was signing documents. He was interviewed by North Carolina and South Carolina DOT over and over again to get his DBE certifications and he knew how to answer the questions to say he wasn't subcontracting, to say he picked his own jobs to bid on, to only give over the one bank account and not the other. He knew what to do. And in fact, back in 2009 he was approached by the FBI and DOT and they started asking him questions and he knew exactly when to stop answering questions. He is not completely unsophisticated. He certainly knew how he was supposed to answer questions and how not to answer questions.

Moreover, when -- as it's pointed out in the factual basis in the PSR, at some point Boggs Paving wanted to get off of their books some trucks that he had been purchasing from them so he went to the bank and he took fake tax returns. He knew that his tax returns weren't going to be enough money to get that loan so he took fake tax returns. And that wasn't the only time he'd taken fake tax returns to a bank. He did that for his personal residence to be refinanced. He had done that on other occasions.

And he also, you know, as much as he's unsophisticated, he had a lumber truck that worked for someone else. He had a nightclub for some of the time we're here. We're not talking about someone who was merely signing documents. He's a bit more sophisticated than that.

And as we think about his sentence, we want to think about if you're a DBE or you're a minority and someone says, Hey, let's make an arrangement: You just sign documents, you get a little extra. What's going to stop them from doing that? And respectfully, where we are in the guidelines, I'm not sure that they're going to have any reason not to. If the loss is going to be zero and they're going to be looking at probation, I'm just not sure what motivation they're going to have to not sign up. Why wouldn't you sign up for a little extra money?

THE COURT: But you're going -- you're asking me to vary upward.

MS. SUGAR: I didn't say I was asking you to vary upward. I'm telling you that I think that Mr. Cuthbertson is the hardest in terms --

THE COURT: You can argue to me whatever sentence you want to argue. In other words, the government -- the government's entitled, just like they are, to argue whatever the sentence ought to be.

MS. SUGAR: Yes, Your Honor.

THE COURT: The guideline range in this case -- the Court's going to try to decide what the right sentence in this case is. The Court didn't find this so it could sentence everybody within the guideline range. The Court wants to find out what the right -- decide what the right sentence is. I may agree with you or disagree with you on the right sentence. The Court is looking at the 3553 factors to determine what sentence within the range the government set -- the government set the top, as far as this Court is concerned, at five years when it said that that was -- you were going to ask for no more than that.

Again, when I looked at the case, when it first comes in, you look, is this $84 million that's been stolen? The answer is no. The government got everything it wanted except compliance with the DBE program. They got -- everything got built. And apparently everything got built well. So the violence that was done in this case is the harm to the DBE program. And so the Court's got to decide what the correct sentence is in this case which will prevent others -- will prevent any further harm from these defendants and will protect the public from further harm by the other -- by other folks deciding they want to go into this type of conduct. So they'll go, Please don't give me any of that.

MS. SUGAR: Yes, Your Honor.

And another issue here is that when we have a case like this that it's really hard to get cooperators in, we don't really have much of a -- if the same sentence would apply to someone who didn't cooperate as someone who did cooperate, that also is a challenging circumstance for the government. I don't think that Mr. Cuthbertson who wasn't able to cooperate should get the same benefits as someone who did come in, who took a stand and made a hard decision and cooperated. So there's a number of reasons why I'm concerned about where we're ending up.

That being said, Mr. Cuthbertson got about $80,000 in extra commissions for his participation. And so if we -- if you had gone with the Court's number -- if you had gone with the government's number, rather, I wasn't going to come in and ask for something that was then in that range because I thought that the $80,000 might be a better place to look for Mr. Cuthbertson due to the nature of his involvement, due to his -- due to his -- the different factors. When you read his PSR, when you read the filings by the defense, there's certainly some mitigating factors that aren't present for the other defendants.

So keeping those things in mind, as to

Mr. Cuthbertson, I don't think that the 3553(a) factors and my analysis before would suggest that an upward variance is appropriate. But that doesn't mean that I think that straight probation or a zero month sentence is appropriate.

I think what that means is that the Court can fashion a sentence that includes jail time or home confinement or something within the 0 to 6 months that would serve to deter others who would sign up to be a DBE. If there's no -- if there's no consequences, who would know that you need to cooperate or that you should consider cooperating because it will benefit you? So we don't think that straight probation is appropriate in this case. But we're not going to ask, as to Mr. Cuthbertson, for a variance, an upward variance above this range.

We would also ask that fines be imposed as to all the defendants. As you noted, we are not seeking restitution in this case. It's a very challenging thing to do restitution when the roads are built. But the case law that we pointed out in one of our sentencing filings says in a case where restitution may not be appropriate, that jail time and fine may instead be appropriate as part of the punishment in the case.

And for those reasons, we would ask that Mr. Cuthbertson not receive a straight probationary sentence. We don't think that would deter others from being involved in his role; but, rather, would ask for either imprisonment or some type of community or home confinement within the range of 0 to 6 months as appropriate because of the very many mitigating factors that apply to this defendant in this case.

THE COURT: And what's the government's argument on fine, if any?

MS. SUGAR: I think we're going to ask for high end for fine for everyone. Mr. Cuthbertson has some resources, I think, that he can pay. I think that this is the kind of case where monetary fines -- because restitution isn't applicable and because the government thinks that the loss here doesn't accurately reflect the conduct where we would ask for a high end fine.

THE COURT: What's the fine range?

MR. BAKER: 2,000 to 20,000.

THE COURT: Two to 20.

Okay. I'll hear from the defense on sentencing.

MR. ASHMORE: Thank you, Your Honor.

Your Honor, I'm surprised that Ms. Sugar would ask for anything other than a straight probationary sentence which, you know, a 0 to 6 month range would be very typical across --

THE COURT: If I don't vary. If I don't vary.

MR. ASHMORE: Yes.

THE COURT: She's not asking for a variance, but that doesn't mean I won't vary.

MR. ASHMORE: I understand, Your Honor. And thank you. But she began by saying the government was looking for a way to not even include him in the indictment, Your Honor. And that gives you a level of understanding of the very minimal participation that Mr. Cuthbertson had in this case.

Your Honor, if I can just briefly point out about his background. He's 71. He's got zero criminal history points, making him a category I. He's just -- he's never been in trouble other than driving violations, Your Honor.

And as paragraph 33 in the presentence investigation report points out, he is simply an unsophisticated truck driver. That's what he does, Judge. He drives trucks. And he fixes trucks. That's where his profit margin, as modest as it may be, comes from. He's actually a good, self-taught mechanic. He would show up for work. He worked hard. He had others that would drive for him, Your Honor. He's just a hard working, very modest, very pleasant man, Your Honor.

He apologizes to the Court for his involvement in this case and he wants to speak to you briefly in just a few minutes to express that, Your Honor.

But obviously, he's a very quiet man, a man of very view words. And, Your Honor, in particular, I don't want to get too much into it, but paragraph 82 of the presentence investigation report itself points out the very limited mental capacity that he has in this -- in day-to-day life, Your Honor.

Your Honor, he's got a number of medical issues, again, outlined in the presentence investigation report. Since then it's only gotten worse, Your Honor. He can't see through one eye because of a stroke suffered some ten years ago. And his other eye, Your Honor, is failing. He can not -- he can't get his CDL, commercial driver's license, due to vision problems. It's only getting worse, Your Honor.

And, Judge, I've been to his house. I've been inside his house. He lives a modest, quiet lifestyle. I think even Ms. Sugar has pointed out that his earnings over the years might have been in the 20 to 30 thousand dollar range, and that's perfectly consistent with what I've witnessed in my many dealings with Mr. Cuthbertson.

Your Honor, he did try and help. He tried his hardest. I got him in before the indictment, after the indictment, after pleas were being negotiated, but he only knew so much, Your Honor. He only knew so much to help himself, and apparently he couldn't cross that hurdle in the eyes of the government to say that he had rendered substantial assistance. He was willing to, Your Honor. And he certainly confirmed everything that they knew. He never denied that. But it just wasn't enough to get him that downward departure that we were seeking.

So, Your Honor, if ever there was a case, in my humble opinion, that dictates a probationary sentence under the 33 -- 3553 factors, it's Mr. Cuthbertson.

He is here with a number of family and friends. If I can get them just to stand briefly.

Thank you.

He's a likable, well loved man in the community, Your Honor. And the government is making some kind of policy arguments as to other cases. I just want you to sentence Mr. Cuthbertson, Your Honor, for his role in this offense. It's a to 6 month range. I think probation, again, under the factors that you must use, probation is the appropriate sentence.

I think he wants to briefly address the Court, Your Honor.

THE COURT: All right. Thank you.

Mr. Cuthbertson, anything you would like to say today?

DEFENDANT CUTHBERTSON: Yes. I'm sorry I got into that. All I do is work on trucks and try to drive them, keep them going. That's about it. I mean, you know, that's all that happened, you know.

THE COURT: Okay.

MR. ASHMORE: Thank you, Your Honor.

THE COURT: Yes, sir. Thank you.

Let me see probation for just a minute.

(The Court and the probation officer conferred.)

THE COURT: All right. The Court, considering everything with regard to the defendant in this particular case, is going to vary upward two levels to zone B to 10, offense level 10, criminal history category 1, 6 to 12 months. There is an understatement of harm in what has occurred with regard to the application of the guidelines in this case finding that the loss was $37,000. Again, the government got all that it asked for, but the harm was to the program. And in looking at the 3553 factors, which include keeping others from committing this crime, the Court is going to sentence at that -- depart upward at that.

However, the Court does also recognize when it looked into this case with regard to this defendant, talked with probation, and understands the defendant does not read and write very well. There's some evidence that with regard to signatures, that he had some difficulty from time to time with that. That does not show a lack of intelligence, but it does show there was a reason why he was allowing so much to be done and why he is so loyal to the Boggs folks. The Court gives him no credit for that, but it doesn't penalize him for his failure to be more forthcoming.

Again, this is a serious matter and the Court doesn't think that -- although the Court does not believe that prison is -- should happen for this defendant, the Court wants to, again, send a message that it does -- this is not -- the fact that the Court found this particular finding with regard to loss, which once again is an academic exercise, the Court has done very, very hard to try to figure it out, does not mean that the Court is just going to go right down to the bottom of this thing and sentence people when there is a problem. People need to be deterred from this kind of -- from ignoring these regulations and acting like they just don't exist.

And I agree that Mr. Cuthbertson was more a tool in this than he was a starter or a person -- he would have been probably happy if they filled out all the DBE stuff and got him qualified. And he certainly would have been a qualified person to be a DBE. The Court thinks that that's probably what ought to be. Truck driving DBEs probably ought to be -- instead of the sharply dressed DBE who happens to fit the profile and then goes out and gets people like Mr. Cuthbertson to do all the hard work while they sit in the office. So I would hope they would start looking at those kind of folks, hard working folks, day-to-day folks for the DBEs.

All right. With that said, the Court will now pronounce sentence unless there is something else.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court, having considered the factors noted in 18, United States Code, Section 3553(a), that the defendant, John Cuthbertson, is hereby placed on probation for a period of two years. During the period of probation, defendant is to spend three months of that under house arrest.

I will leave electronic monitoring up to the probation office.

In this particular case defendant will be allowed to work, but will have to be under the regular terms of house arrest that the probation office puts on the defendant.

While on supervised -- while on probation, the defendant shall not commit another federal, state or local crime, and shall comply with the standard conditions of probation that have been adopted by the Court in the Western District of North Carolina.

Defendant is to pay a fine in the amount of $2,000.

And the defendant shall pay the United States a special assessment of $100.

The $100 is due and payable immediately.

The $2,000 is to be paid at the rate of not more than $100 a month to begin the month following the defendant's going on to probation.

Throughout the period of supervision, the probation officer shall monitor the defendant's economic circumstances and report to the Court with recommendations as warranted any material changes that affect the defendant's ability to pay court-ordered penalties or fines.

Defendant shall forfeit any interest in property identified by the United States.

I don't know if there is anything that's been identified for this defendant. Has there been anything forfeitable in this case, Ms. Sugar?

MS. SUGAR: As to the individual defendants, we're not proceeding on forfeiture.

THE COURT: All right. Thank you.

Is there any legal reason why this should not be the sentence in this case?

From the defense?

MR. ASHMORE: None, Your Honor.

THE COURT: From the government?

MS. SUGAR: No, Your Honor.

THE COURT: All right. That is the sentence in this case.

Now, Mr. Cuthbertson, you may appeal this conviction and sentence to the Fourth Circuit Court of Appeals. Any appeal must be done in writing and must be done within 14 days from when I enter the written judgment in this case. It will be a written judgment in this case. Your attorney can advise you of that. If you wish to appeal and do not have the finances with which to appeal, you may appeal at no expense to you.

I would suggest you speak to your very able counsel about whether in this circumstance you wish to exercise your right to appeal. But do you understand your right to appeal as I have just explained it to you?

DEFENDANT CUTHBERTSON: (No response.)

THE COURT: Let me say it again.

DEFENDANT CUTHBERTSON: Yes.

THE COURT: Let me say it again. You can appeal this if you want to. Okay?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: You've got to do it within 14 days and you've got to do it in writing. Your lawyer will help you do that if you want to appeal. That's the conviction and sentence. You have the total right to do it except as you have agreed in your plea agreement. You may have agreed in your plea agreement to only appeal for prosecutorial misconduct or ineffective assistance of counsel. That's a fairly standard provision in there. You're going to need to talk to your lawyer about what, if anything, you can appeal. But whatever right you've not given away contractually, that is, whatever right you've not agreed to give up, you still have. And so if you want to appeal, you can appeal.

Do you understand that?

DEFENDANT CUTHBERTSON: Yes.

THE COURT: Okay. All right. Anything further from the defense?

MR. ASHMORE: No, sir.

THE COURT: Anything further from the government?

MS. SUGAR: No, Your Honor.

THE COURT: All right. This matter is concluded. Thank you.

MR. ASHMORE: Thank you, Your Honor.

(The Court and the deputy clerk conferred.)

THE COURT: Before defense counsel leaves, the government is dismissing the remaining counts?

MS. SUGAR: Yes, Your Honor. And also, pursuant to Mr. Cuthbertson's plea agreement, we are dismissing the counts as to his business as well.

THE COURT: Okay. Let those be dismissed.

(End of proceedings at 11:43 a.m.)

THE COURT: All right. Let's call the case of United States versus Greg Tucker.

Is the defendant ready?

MR. KNIGHT: Yes, Your Honor.

THE COURT: Is the government ready?

MS. SUGAR: Yes, Your Honor.

THE COURT: Okay. Mr. Tucker, if you would, please stand.

Mr. Tucker, do you recall appearing before a United States magistrate judge for the purpose of entering a plea of guilty in this case?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: Do you remember being placed under oath at that time?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: Do you remember answering the questions of the judge?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: Do you remember signing a plea transcript form indicating the answers you gave the judge that day were true and accurate to the best of your knowledge?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: If I were to ask you the same questions today, would you answer them the same way?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: All right. Thank you.

Counsel, do you believe your client understood fully the questions the magistrate judge asked at the Rule 11 hearing?

MR. KNIGHT: Yes, I do, Your Honor.

THE COURT: Thank you.

Mr. Tucker, did you answer the questions the way you did and are you going forward with your guilty plea today because you did commit the crime you're pleading guilty to?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: Then based upon those representations and the answers given by the defendant at the Rule 11 hearing before the magistrate judge, the Court affirms the judge's finding that the defendant's plea was knowingly and voluntarily made. The Court also affirms the judge's finding that the defendant understood the charges, the potential penalties, and the consequences of his plea. Accordingly, the Court affirms the magistrate judge's acceptance of the defendant's plea of guilty at the Rule 11 hearing and also accepts it here today.

Ms. Sugar, would the government have a factual basis for this case?

MS. SUGAR: Your Honor, the parties have stipulated to the facts as filed in the factual basis and set forth in the presentence report.

THE COURT: What says the defendant about the factual basis as set forth in the presentence report?

MR. KNIGHT: We agree, Your Honor. We stipulated to that.

THE COURT: Based upon that stipulation and the offense conduct as set forth in the presentence report, the defendant's plea of guilty before the magistrates judge, and the defendant's admissions in open court today, the Court finds there is a factual basis for the entry of the plea of guilty and enters a verdict and judgment of guilty in this case.

Mr. Tucker, your case was referred to the United States Probation Office for a presentence investigation and the preparation of a presentence report. The Court has now received that report. Have you read that report?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: Have you gone over that report with your attorney?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: Do you now believe you understand the contents of that report?

DEFENDANT TUCKER: Yes, Your Honor.

THE COURT: Counsel, have you gone over that report with your client and do you believe he understands the contents of that report?

MR. KNIGHT: I have, Your Honor. I do believe he understands the contents.

THE COURT: Are there any objections to the presentence report which are outstanding at this time?

MR. KNIGHT: No, none that are relevant now that loss amount has been determined by the Court.

THE COURT: All right. Thank you.

Any objection -- any objections from the government other than the objection on the loss which is a standing objection throughout this case?

MS. SUGAR: No, Your Honor.

THE COURT: All right. Thank you.

Then the Court will adopt the information contained in the presentence report for the purpose of applying the guidelines with the loss amount being as the Court has found and then will try to determine with regard to the 3553 factors what each person should be sentenced to.

All right. Are there any -- it would appear based upon the Court's finding -- where are we on this defendant?

MR. BAKER: This is another 8 and I, Your Honor.

THE COURT: All right. This is a total offense level of 8, a guideline -- a criminal history category of I, and a guideline sentencing range of 0 to 6 months without a variance being taken into consideration.

What says the government on sentencing?

MS. SUGAR: Your Honor, had the government's loss recommendations been adopted, we would have been asking -- and we still are asking for a 5K motion based on Mr. Tucker's substantial assistance in this case. The numbers now have changed so we can talk through what is appropriate.

THE COURT: Okay.

MS. SUGAR: So first, with regard to Mr. Tucker, seeing as he has the same loss as someone such as Greg Miller who didn't cooperate and Mr. Cuthbertson, but Mr. Tucker was on the Boggs Paving side of things, we don't think that the guideline -- the loss calculation at 8 is the appropriate starting point. We think that that understates the loss because of the harm here and we believe that an upward variance of six levels to a level 14 is really the correct starting point for this analysis because a loss amount of $30,000, it just doesn't reflect what happened here. It doesn't reflect that $87 million worth of federal contracts alone were obtained through the fraud. That more than $3.7 million was told to the DOT as having been paid to Styx as a legitimate DBE. That more than a hundred thousand dollars of small business projects were obtained by Boggs Paving in Styx's name. That more than $7 million were circled through a nominee bank account and with more than 6 million returning to Boggs Paving and its affiliates.

And based on all of those factors which Your Honor has heard substantial amounts about, we think that the right starting place before the 5K would put Mr. Tucker and his co-defendants as to the loss, anyway, six levels above where they are which would be a 14, 15 to 21 months.

Now, certainly as to Mr. Tucker, even when the government believed that the loss was -- put the guideline range at 37 to 46 months, we asked for a 5K down to a zone B which is 4 to 14 months. So now we're at a lower starting place, Your Honor. If we're starting at 15 to 21 for a six level, then all of a sudden our zone B recommendation for him doesn't look as generous percentile wise as where we were.

Your Honor heard Mr. Tucker testify. I believe -- well, this Court knows -- whether the Court thought that he was truthful, we certainly did.

And, you know, I think it all comes back to this simple piece of paper that Your Honor saw numerous times. Here's Greg Tucker January of 2011 telling Drew Boggs, "It's a freaking small business contract. Styx can bid I assume?" And Drew Boggs says, "10-4." Because everything that Greg Tucker did, like the other project managers who were -- like Arnold Mann, like Greg Miller, was to benefit the company and was part of the way that the company operated. Each part of the company. And Greg Tucker was just in the project management part. He wasn't in the finance part. He wasn't in the trucking. Each part of it worked so that no matter what you wrote in, you would have enough Styx to meet the goal.

So all of these sort of questions he was faced with during his cross examination of why didn't you check the DBE numbers. Of course he didn't. That was part of the point of how things worked at Boggs Paving starting from when Styx Cuthbertson was written in the contract, everyone knowing he wasn't -- or didn't need to do the work. And as you saw from all of those examples of how the money circulated, sometimes right back to Boggs Paving, not even to any trucking. Written in for liquid asphalt, trucks he didn't even have. Written in a contract with Palmetto that Drew Boggs himself wrote of let's just, you know, run it through Styx. Whatever work Palmetto does, we'll claim it for DBE credit. That was how things worked at the company.

And I think that Mr. Tucker set that out and he said it very forcefully in his testimony, but also backed up by the record. It's backed up by his emails telling Drew Boggs exactly what he was doing. It's backed up by what Mr. Miller said, that Drew Boggs is the guy who said, Write them in even if everyone was saying it won't work.

So Greg Tucker's testimony was both truthful, but I think it was also -- I think we also have to look at the context here. And I talked a little bit about this during Arnold Mann's sentencing. We knew what happened here. We knew how the money flowed. And we wanted to look at the higher ups. And this is a company where loyalty is valued very much and it was very difficult for people to come in and admit what had happened. It was very challenging in this case. We talked to a lot of witnesses, and you don't go against the boss. You don't go against the person in charge. And for him to come in and be part of the -- with him and Mr. Hicks, to come in and tell the truth was brave. And it was -- this is a small community in the construction industry and being the guy, the one guy who testifies against his former boss is a very intimidating place to be, and we certainly recognize Mr. Tucker for doing that and providing testimony that was consistent with all the records in this case.

So when we start back at that range, when we start back at a range of -- if we depart up by six levels to a 15 to 21 and now --

THE COURT: Vary.

MS. SUGAR: Vary, I'm sorry.

THE COURT: Vary.

MS. SUGAR: If we varied up from the 0 to 6 months to a 15 to 21 months, we would then need to recognize the substantial assistance of Mr. Tucker. And we don't -- he certainly had a role. He was all over these emails. There was very strong evidence against him like there was against others too. So we don't think he had a lesser role in that as compared to Arnold Mann or others, but he certainly did in terms of the leader/organizer. Well, he doesn't have that enhancement so I think that is already reflected to some extent.

But we do want to recognize his assistance with a 5K. And if we were willing to go down to zone B even when he started at a 37, then we have to, you know, be smart about what we do now. We want people to come in and give us truthful cooperation and know that they are going to get something substantial and they're not going to get the same thing that they would get if they went to trial.

THE COURT: I understand. Let me just tell you what was running Cuthbertson on the sentence is the fact that he was used by the folks at this company to run -- to get the profit in this and everybody that came in the probation office said, The one we feel sorry for is Cuthbertson.

MS. SUGAR: Right.

THE COURT: So everybody recognized his low-on-the-totem-pole position whether he ever decided to dime out everybody or not. And I do understand the government has to be very careful in how it uses its ability to get people to cooperate. It's a very important tool the government has. The Court recognizes that and wants to encourage that. But understand part of what was running Cuthbertson's sentence in that case was who he was and where he was that I saw him in the scheme regardless of where the government found he was in the scheme, regardless of whether he cooperated and helped, who he was looking at all the 3553 factors. The Court felt that that was the best sentence for him. So you don't have to necessarily tie everybody to him.

MS. SUGAR: Yes, Your Honor. In that case I didn't say let's upward vary. I am saying we need to upward vary here. I agree, they are different situations. But I also want to recognize Mr. Tucker's cooperation which has been very extensive and we think was one of the big reasons that everyone ultimately pled guilty in this case.

But if we were to start at that level 14, then we go back to our recommendation was a zone B, and we do think that there are a lot of options that the Court has, including home confinement, community confinement or a split sentence within zone B that is appropriate in these circumstances.

Now, we do recognize we already asked for zone B when we were up at 37. So Mr. Knight is certainly going to say you need to come down lower because you didn't start as high. But we still need to have a sentence that meets the 3553(a) factors and deters. And even though the sentencing -- or the judge has found -- this Court has found the loss to be lower than what we believe is appropriate, that doesn't mean that the sentences that ultimately are appropriate is different.

THE COURT: I don't know how many times I can say it, Counsel. The Court understands there's a harm done which is significant in this case to which the loss does not address, the loss amount does not address. Just not -- you know, I recognize that throughout. That's what caused me to struggle with this case so much. It would have been very, very easy if I thought, oh, that's the loss amount and that's appropriate. Wow. The problem was the Court was sitting here going that can't be it. $37,000 can't be the answer. But it was the answer. And so that's why the Court gave it.

MS. SUGAR: So we believe that the -- what was sought originally, the zone B, will give this Court the room that's appropriate to sentence this defendant, considering that really an upward variance is appropriate based on the Court's findings, but also considering his substantial assistance in this case.

THE COURT: Okay. Mr. Knight.

MR. KNIGHT: Thank you, Your Honor.

Just so I understand the government's recommendation, that after the Court's finding of loss amount --

THE COURT: Yeah.

MR. KNIGHT: -- that now he's at an offense level of 8 and the government is recommending, after we go through the fact -- as to the upward variance up to 14, an offense level of 9, I would assume is the lowest within zone B that the government is recommending?

MS. SUGAR: Yes.

MR. KNIGHT: So -- and the way it turns out, Your Honor, is they are recommending an upward variance which is extraordinary in a case where someone provides substantial assistance, particularly in a case like this.

THE COURT: It is, but this is sort of an extraordinary finding in this case.

MR. KNIGHT: Sure.

THE COURT: I mean, this is a case which looks like procurement fraud but which the Fourth Circuit has found is benefits fraud. And once that -- and right now that's the law in this circuit. Now, who knows what it will be tomorrow. Maybe the supreme court will jump in and change the law and this Court will follow the law when it gets that law. But my job is to try to recognize the law when I see it.

MR. KNIGHT: Sure.

THE COURT: That's hard enough for me to do without trying to find anything else. But that -- it is -- but the government is saying you need to start here and what they're -- you know, that's really what they're saying.

MR. KNIGHT: Yeah. Well, like I said, Your Honor, it's a unique case. I certainly have never been in a position like that before. But as you said, each case is different.

Your Honor, we would argue -- we would ask the Court not to vary upward in this matter really for three reasons: Based on Mr. Tucker's role in the offense, based on the incredible substantial assistance that he gave, and based on who he is.

Your Honor, Mr. Tucker is a good man who made a big mistake, but he's a good man. And he has a lot of people here.

Whoever is here for Greg Tucker, if you would stand up, please.

Just to show you that's the kind of man he is, Your Honor. And the fact -- thank you. You can all be seated.

And, Your Honor, I know you always painstakingly read every page that comes to you and every letter and I'm sure you've seen his sentencing brief. There's 85 people that wrote letters on his behalf, 85 separate people that were willing to take the time to do that for him.

But first let me talk to you a little bit about the fact that he had a very minimal role in this offense. I don't think anybody is arguing he was a leader. He clearly wasn't. You heard his testimony. He certainly didn't get rich off of this. You've seen the PSR, Your Honor. His net worth is about $15,000 now. He wasn't getting kickbacks or anything else. He was simply doing -- you know, doing his job, getting a paycheck, and that was it.

When Your Honor looks, too, at how the indictment charged each person, you'll see that there are 30 total counts in the indictment. And of those 30 counts, they apply to everyone except two people. One being, I think Arnold Mann only had -- was only charged with 27, I think, and Mr. Tucker was only charged with 12.

Now, you were talking about some differences between defendants. Mr. Cuthbertson was charged with 30 and Mr. Tucker was only charged with 12, not even half of the counts that Mr. Cuthbertson was.

In addition, Your Honor, he wasn't charged with the money laundering count. And I'm sure Ms. Sugar would agree that he -- there's no proof that he knew anything about the money that was going into Styx's account and then coming back to Boggs. It simply wasn't part of where he was.

Your Honor, and another reason I would ask the Court to consider not varying upward and giving Mr. Tucker probation is the amount of his assistance. And I would contend that as you said, Your Honor, this is a unique case. And I would say that his assistance has been unique and extraordinary based on the dynamics of this case, of this community, and of that company where he used to work. He was early in the door. And I believe -- I think Ms. Sugar already alluded to this, it was really hard to get people to come in in this case. And when he came in, the guilty pleas started to roll after that because -- in large part because of who he is. And I think people knew that people believe Greg Tucker. And if he was going to get up there and testify, they were going to be in trouble because he is a man of character, of substance, who made a mistake, but he would be somebody that they would believe.

Your Honor, Ms. Sugar would tell you as well, too, I think she already did, that he gave them information they did not already have and substantial information that they could not have gotten from anywhere else and a very important part of her investigation. So I contend that, you know, in addition to being different from Mr. Cuthbertson and that he wasn't charged in as many counts, he also provided not just assistance, but extremely valuable assistance that others simply didn't have.

And, Your Honor, as -- I won't go over his testimony again. You were here. You heard that. And you know how difficult that can be. And that he was the only one that was called to testify. And he's going to have to -- as I said, he's going to have to wear that as he goes through his day-to-day life that he's the only one that was called to testify, and I would ask you to take that into consideration as another part of his assistance.

Your Honor, Mr. Tucker, and you -- in the factual basis and when he spoke with the government, has taken full responsibility for what he did. He has. And, you know, you've seen enough people in front of Your Honor that it's hard after you plead guilty to really take it all and say, yep, this is really everything that I did as opposed to maybe I did this, this, and this in piecemeal. That's not what he did. He went in and the very first time he met with them, he told them everything. And when he finished with them, they said he was great. They believed he was truthful. And they even made the phrase, I believe it was Ms. Sugar or Mr. Savage, that they thought he could be a star witness because he was so truthful, because that's who he is and that's the way he comes across.

Your Honor, Mr. Tucker now has a job. After he voluntarily left Boggs Paving on his own, he was hired by someone else. And that person, that company knows that he had already pled guilty and that this charge is pending. They hired him anyway because they think that much of him. Your Honor, if he did receive a term of incarceration, he might lose that job. So I'd ask you to take that into account as well too.

Your Honor, just to briefly tell the Court, too, about who he is, we'd like to call two witnesses to the stand that won't take long. I'm going to ask that they come up and speak on his behalf.

THE COURT: That would be fine.

MR. KNIGHT: Thank you, Your Honor.

First is Kathy Fir.

MS. SUGAR: Your Honor, we would also be fine if they want to just proffer.

THE COURT: I'll leave it up to however you want to present the evidence.

MR. KNIGHT: Okay. Why don't you go on up there.

KATHY FIR, DEFENDANT TUCKER'S WITNESS, SWORN,

DIRECT EXAMINATION

BY MR. KNIGHT:

Q. Would you please state your name for the record.
A. My name is Kathy Fir.
Q. And Kathy, what do you do for a living?
A. Well, for a living I don't do anything right now. I'm retired.
Q. Okay.
A. And I do -- I am on the board of directors at the West Stanley Christian Ministry. I've been on there since '97 when the conception of the organization came about.
And I retired recently from a job with AT&T where I worked in the corporate world for 35 years and I worked in a type of middle management similar to what Greg did. I handled contracts and I did logistics and management for disaster -- network disaster recovery. And I did that for 15 years for them.
Q. And how do you know Greg Tucker?
A. I know Greg Tucker because we were raised in a small community, very small. We used to call it a town. I think now they call it a village. There's about a thousand people or less in our area in the little town we live in. I have watched Greg from the time he was a little guy to now when he's grown into a man raising two children himself and see the type of person that he is.
And my husband actually graduated from high school with his mom. I know his mom and dad as well.

Q. Well, tell me, then, what kind of person is Greg Tucker?
A. Greg Tucker is the kind of person that is my third son. I have adopted him and his wife and their two kids as our grandchildren. My husband and I watched Greg and his wife play in high school the sports that they were involved in. I've watched him grow up in the community and help people in our community. I'm in -- I'm kind of in a rare spot. I can see a lot of things from being at the Christian ministry and I know who gives and who helps. And I know what kids get Christmas that wouldn't have it without people like Greg Tucker and Wendy. I know people that need medical care and medicine that would not get it without their help.

And I just know -- my husband and I always laughed that if -- we had one son that was a brainiac and one that was a social person; and if we'd have had a third one, they'd have been normal like Greg.

So we have always enjoyed their family and their friendship. And over the last five years, my husband has been very ill with cancer. He passed away recently. And my sons live out of state and we have nobody close to us as far as family. And as far as when we needed something, we called on Greg and Wendy and they have never let us down. My sons depended on Greg to help us when we were -- you know, when they couldn't be there. And he doesn't know, but I know, that they call him and they talk to Wendy and find out how I'm doing and things. And a week doesn't go by that I don't get a text or a call from him or from his wife and -- to see how we're doing.

I made myself a note here because I didn't want to -- didn't want to forget what I was saying. Since my husband passed away, my mind scatters at times. I know you probably can understand that.

But we have gone through a lot together. And I wouldn't be presumptuous to say I know Greg as well as his mom and dad do because I'm sure I don't. But I can tell you, I've been through life experiences with Greg Tucker. There is no finer, better Christian man in my community than Greg Tucker is. I trust him.

My sons and I have talked. My sons travel a lot. And they have two small -- I have two small grandchildren now. And they said if something happened to them, they would let Greg Tucker raise their children. I don't think anybody could ever say anything any better about another person than to say that.

I know -- I saw him raised. I know how he was raised. I know how he lives and he's never changed.

So I ask that he be treated like he treats other people.

Q. Thank you very much.

A. Uh-huh.

MR. KNIGHT: I don't have any other questions.

Ms. Sugar, do you have any questions?

MS. SUGAR: No, Your Honor.

MR. KNIGHT: Thank you, ma'am. You can step on down.

(Witness stepped down.)

MR. KNIGHT: And, Your Honor, our next witness is Sherry Vaughn.

Ms. Vaughn, if you would step on up.

SHERRY VAUGHN, DEFENDANT TUCKER'S WITNESS, SWORN,

DIRECT EXAMINATION

BY MR. KNIGHT:

Q. Would you please state your name.

A. Sherry Vaughn.

Q. And, Ms. Vaughn, how do you know Greg Tucker?

A. I've known of Greg since I was in elementary school. One of his --

Q. What do you do now for a living? I'm sorry to interrupt you.

A. I'm sorry. I work my family business, Locust Pump and Well Drilling. And I also serve on the Stanly County School Board.

Q. On the Stanly County School Board, is that what you said?

A. Yes.

Q. I'm sorry, go ahead. How do you know Greg Tucker?

A. Greg's cousin Lori was a friend of mine all through elementary school so I always knew of Greg and the Tucker family, but I've known him personally for the last 16 years and that's through church. My husband and I started going to the Mission Baptist Church 16 years ago and Greg and the Tuckers all attend there, and Greg is a Sunday school teacher.

Q. What kind of man is Greg Tucker?

A. Greg Tucker is a man of integrity, of virtue. He is a respected man in our community. He is a pillar in our community. He is an awesome father, husband, friend. You just can't -- you can't say anything bad about Greg Tucker.

If I might, I'd like to read something to you.

Q. Sure, go ahead.

A. Just to give you a little bit of background, Greg is a large Andy Griffith fan and sometime back in our Sunday school class we did a series on Andy Griffith that Greg taught. And honestly, if -- in the show if Andy Griffith had been a project manager in a paving business, it would have been Greg Tucker. I mean, he is that kind of guy.

I read a quote sometime back that Brad Paisley had said on Andy Griffith's passing. And it says, "A moral compass who saved as many souls as most preachers. Andy Griffith made the world a better place, and I was so proud to call him a friend."

Well, that's Greg Tucker. We should all have a moral compass as Greg Tucker.

MR. KNIGHT: Thank you very much, Ms. Vaughn. You can step down.

THE COURT: Any questions, Ms. Sugar?

MS. SUGAR: No, Your Honor.

(Witness stepped down.)

THE COURT: Any further evidence, Mr. Knight?

MR. KNIGHT: No, Your Honor, no evidence.

As I said, Your Honor, this is just -- in my 20-plus years of practicing law, 10 sitting over there at that table and 10 over here, I've never been in front -- or seen a hearing where there was a motion for substantial assistance and downward variance and I was arguing to the Court not to vary upward.

THE COURT: But you didn't have one of these cases like this.

MR. KNIGHT: No, thank goodness, I didn't.

THE COURT: And I haven't seen one like this. It's a kind of one-off, I hope, kind of case.

MR. KNIGHT: Based on what I explained to the Court, his role in the offense, his substantial assistance and who he is, we'd ask that the Court sentence him to probation. I think that is the appropriate sentence based on everyone else's positions in this case and based on the cooperation by Mr. Tucker.

THE COURT: All right. What would you like to say,

Mr. Tucker?

DEFENDANT TUCKER: I'm good, sir. I'm good, sir. Thank you.

THE COURT: Okay. Thank you.

Well, the reason the government, I think, is doing what it's doing is because it wants to recognize the seriousness of the problems to the program. I think that's what they're talking about. And that is what's been damaged here. People can't just ignore these programs at their will and operate their businesses as if they don't exist. If they're going to try to take advantage of something that's there, they have to do things right. And it was just done wrong, done wrong with no care about that. So I think that's why the government is doing what it's doing. The Court does recognize, though, that Mr. Tucker has substantially assisted in this case.

If there's one thing that's clear, this is an organization where there was a lot of loyalty. Probably brought about by -- for good reasons. Probably -- I don't think that I'm sentencing a bunch of bad people today who have been doing bad things every day of their lives. I think they've done a bad thing in this case, but I don't think they're bad people who have done a bad thing or that the loyalty is based upon anything. And I think it's very significant that Mr. Tucker has stepped forward and agreed to cooperate with the government. The government needs this kind of thing.

I also understand exactly what the government is saying. The government is saying this is not under the normal circumstances of the crime a 0 to 6 month case. Normally this is a -- this is a case which would have to be taken care of by a higher guideline. And I think what they're trying to do is be consistent. I understand what they're trying to argue at this time. They're disappointed that their argument didn't carry the day and they're trying to reformulate to allow the Court to know they think this is a serious matter. They want to argue that it's a serious matter. They want the Court to look at it as a serious matter. And everybody didn't cooperate. So the Court recognizes that.

And the Court will say this with regard to variance. The Court believes that the defendant's participation, and in looking at all the 3553 factors in this case, absent -- and the harm done, recognizing no money -- no United States taxpayer money was lost in this case. There is no restitution being asked for by the government. No money is lost. Recognizing that and recognizing the harm is to the program of Disadvantaged Business Enterprises and that that program has been hurt and an uncalculable number of businesses could not have gotten work during that period of time, and maybe some of them aren't in business now because of that.

Realizing that there is a harm done here, the Court is going to say that absent the cooperation, that the -- that a -- a 14 would be appropriate for Mr. Tucker, 15 to 21 months. However, because of the fact that he has substantially assisted, the Court is going to grant the motion of the government for a 5K and depart downward to offense level 8, criminal history category 1, 0 to 6 months, and is going to sentence in that category. I think that -- his assistance and the seriousness of the crime balance out in his case and I'm going to give him a probationary sentence.

Stand up, please.

Pursuant to the Sentencing Reform Act of 1984 and *U.S. v. Booker*, it is the judgment of the Court, having considered the factors noted in 18, United States Code, Section 3553(a), that the defendant, Greg Tucker, is hereby placed on probation for a term of two years.

While on probation, the defendant shall not commit another federal, state or local crime, and shall comply with the standard conditions that have been adopted by the Court in the Western District of North Carolina, and shall comply with the following additional conditions:

Defendant shall pay the United States a special assessment of $100.

What says the government about fine? Probation is recommending -- is finding that the defendant does not have the ability to pay a fine or interest. Anything -- any argument from the government on that before I do it? Are you going to waive any argument of fine thanks to his cooperation?

MS. SUGAR: Your Honor, he is currently employed. I do think he can pay a fine. Certainly at least the level that Mr. Cuthbertson is going to pay a fine.

THE COURT: Mr. Knight, anything you want to argue?

MR. KNIGHT: No, Your Honor. I mean, Your Honor, you've seen his net worth. He did voluntarily leave the company so I don't see how in this case a fine would really do -- as you said, there's no loss, you know, so a fine would sort of be --

THE COURT: No, but it's kind of -- you know, it's part of the punishment aspect of the case.

The Court is going to order defendant to pay a fine of $1,000.

If the defendant -- the monetary penalty is due and payable immediately. While on probation defendant shall make monthly payments in the amount of $50 a month to commence within 60 days after being placed on probation.

Throughout the period of supervision, the probation officer shall monitor the defendant's economic circumstances and shall report to the Court with recommendations as warranted any material changes that affect the defendant's ability to pay any court-ordered payments.

Any counts to be dismissed, Ms. Sugar?
MS. SUGAR: Yes, Your Honor. We would dismiss all remaining counts as to Greg Tucker.
THE COURT: All counts are hereby dismissed.
Anything further -- oh, I've got to do the appellate aspect of this.
Mr. Tucker, you have a right to appeal this conviction and sentence to the Fourth Circuit Court of Appeals. Any appeal must be done within 14 days and must be done in writing. If you are unable to -- if you wish to appeal and are unable to afford an appeal, you may appeal at government expense.
I would suggest you speak with very able counsel about whether in this circumstance you wish to exercise your right to appeal. But do you understand your right to appeal as I have just explained it to you?
DEFENDANT TUCKER: Yes, Your Honor.
THE COURT: All right. Thank you.
Anything further from the defense?
MR. KNIGHT: No. Thank you, Your Honor.
THE COURT: Anything further from the government?
MS. SUGAR: No, Your Honor.
THE COURT: This matter is concluded.
(End of proceedings at 12:26 p.m.)
MS. SUGAR: Your Honor, are you going to keep going

or do you want to take a lunch break?

THE COURT: Let's take a lunch break. I think -- unless there's somebody -- I see someone has risen. Mr. Winiker is behind you.

MR. WINIKER: I would prefer the Court have a lunch break, but I did have a travel issue, but we are --

THE COURT: What time are we going to be going to lunch -- I mean, what time are we going to be traveling? Tell me.

MR. WINIKER: 4:00 p.m.

THE COURT: 4:00 p.m.

MR. WINIKER: Yes, Your Honor.

THE COURT: All right. And who do we have next? Is your person next?

MR. FIALKO: Greg Miller, my client.

THE COURT: Greg Miller and then yours.

MR. WINIKER: Yes, sir.

THE COURT: I think if we take an hour for lunch, if we come back at 1:30, we can get to him and then do you next.

MR. WINIKER: Yes, sir.

THE COURT: Is that right, you're after him?

MR. WINIKER: Yes, Your Honor, according to the order the Court set.

THE COURT: I mean, we can change the order if we have to. But let's go ahead, I think we'll be able to get this done.

How long do you think your sentencing is going to take?

MR. FIALKO: No more than 30 minutes.

THE COURT: Okay. You'll be easily able to get through by 4:00.

MR. WINIKER: Yes, Your Honor.

THE COURT: Okay. We'll be in recess, then, until 1:30.

(Lunch recess at 12:27 p.m.)

MONDAY AFTERNOON, NOVEMBER 23, 2015

(Court resumed at 1:30 p.m.)

THE COURT: All right. We'll call the case of United States versus Greg Miller.

Is the defendant ready?

MR. FIALKO: Yes, we are, Your Honor.

THE COURT: Is the government ready?

MS. SUGAR: Yes, Your Honor.

THE COURT: Mr. Miller, do you recall appearing before a United States magistrate judge for the purpose of entering a plea of guilty in this case?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Do you remember being placed under oath at that time?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Do you remember answering the questions of the judge?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Do you remember signing a plea transcript form wherein you stated the answers you gave the judge that day were true and accurate to the best of your knowledge?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Did you tell the judge the truth that day?

DEFENDANT MILLER: Yes, Your Honor, I did.

THE COURT: If I were to ask you the same questions today, would your answers be the same?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: All right. Thank you.

Counsel, do you believe your client understood fully the questions the magistrate judge asked at the Rule 11 hearing?

MR. FIALKO: Yes, sir.

THE COURT: Thank you.

Mr. Miller, did you answer the questions the way you did and are you going forward with your guilty plea today because you did commit the crime you're pleading guilty to?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Then based upon those representations and the answers given by the defendant at the Rule 11 hearing before the magistrate judge, the Court affirms the judge's finding that the defendant's plea was knowingly and voluntarily made. The Court also affirms the judge's finding that the defendant understood the charges, the potential penalties and the consequences of his plea. Accordingly, the Court affirms the magistrate judge's acceptance of the defendant's plea of guilty at the Rule 11 hearing and again accepts it today.

Ms. Sugar, would the government have a factual basis?

MS. SUGAR: Your Honor, the parties stipulate to the factual basis as filed with the Court and as set forth in the presentence report.

THE COURT: What says the defense?

MR. FIALKO: Yes, we do so stipulate.

THE COURT: Thank you. Based upon that stipulation and the offense conduct as set forth in the presentence report, the defendant's plea of guilty before the magistrate judge, and the defendant's admissions in open court today, the Court finds there is a factual basis for the entry of the plea of guilty and enters a verdict and judgment of guilty in this case.

Mr. Miller, your case was referred to the United States Probation Office for a presentence investigation and the preparation of a presentence report. The Court has received that report. Have you read that report?

DEFENDANT MILLER: Yes, sir.

THE COURT: Have you gone over that report with your attorney?

DEFENDANT MILLER: Yes, I have, Your Honor.

THE COURT: Do you now believe you understand the contents of that report?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Thank you.

Counsel, have you gone over that report with your client and are you satisfied he understands the contents of that report?

MR. FIALKO: Yes, I am satisfied, Your Honor.

THE COURT: Are there any objections to the presentence report which remain outstanding as of this moment?

MR. FIALKO: No, sir.

THE COURT: Any from the government other than your objection on the loss amount?

MS. SUGAR: No, Your Honor.

THE COURT: All right. Thank you. Then the Court will adopt the information contained in the presentence report for the purpose of applying the guidelines in this case and with the exception of the loss findings of the Court which the Court has entered today.

Where does he come down?

MR. BAKER: He's an 8/I, Your Honor.

THE COURT: In the instant case, the advisory guidelines call for a total offense level of 8 and a criminal history category of I, with a guideline sentencing range of 0 to 6 months.

Any objection to that being the guideline range in view of the Court's finding today from the defense?

MR. FIALKO: No, sir.

THE COURT: From the government?

MS. SUGAR: No, Your Honor.

THE COURT: All right. I'll hear from the government on punishment.

MS. SUGAR: Thank you, Your Honor.

The government believes that the guideline range understates the seriousness of the offense and the 3553(a) factors and would therefore ask for a six-level upward variance to a level 14 which results in a 15 to 21 month sentence in this case.

We haven't talked that much about Mr. Miller's role. We've been focused a lot on Drew Boggs, but it's important for the Court to know that Mr. Miller was the vice -- was a -- was the vice president and chief estimator during much of the time period when this fraud was taking place, and he was present in those bids where Styx was written in again and again. In fact, he signed numerous contracts, hauling agreements between himself -- or between Boggs and Styx. The Government's Collective Exhibit 19 which we would offer -- let me...

Here is a February 20th -- the first page, a February 26, 2009, contract signed by Greg Miller for Styx for 163,000.

The next page, May 2009, a contract with Styx for 130,000.

The next page, a $55,000 contract with Styx signed by Greg Miller, June 2009.

The next page, a $40,000 contract with Styx signed October 2009.

The next page, a $19,000 contract with Styx signed by Mr. Miller in August of 2010.

So his name is on many of these and he -- as he said in his factual basis, he was there each time this -- or many of the times that Styx was being written in.

And I think in all white collar cases, it's important to note that this isn't a case where every day all day they're doing DBE fraud at Boggs Paving. That's not how a white collar crime works. That's not how a tax fraud scheme or an accounting fraud scheme or an environmental scheme works at a company. It's a small part of what they do. That doesn't mean it's not important. That doesn't mean that it's not something that warrants a sentence that shows how serious of an offense like this is.

You've heard testimony from North Carolina DOT about the DBE program. How it's designed to lift people up, to promote them. And the scheme at Boggs Paving thwarted that goal. The scheme didn't advance Styx. It prevented the legitimate DBEs from advancing. And in fact, prevented people who weren't cheating from getting these contracts. And it was very serious and it lasted for a very long time.

You saw, you know, almost ten years that we talked about here where they're using this bank account where money is being run in this way. And you also saw numerous instances where DOT, North Carolina DOT, South Carolina DOT, said, Hey, there's a problem, and it continued.

One of the examples that Mr. Tucker testified about, the Browns Hill job. You saw Greg Miller's signature on those papers. He was part of the meeting where DOT said, You're doing it wrong. And after that meeting it continued. Now, he wasn't the leader. He wasn't the organizer. We didn't ask for that enhancement. But the role that he played was serious and he was very high up in the company and there for a long time.

We think that a sentence within that range -- and low end does make sense in this case based on a number of the factors in his sentencing memo -- would be the appropriate thing because we don't want defendants -- or we don't want individuals who say, Well, I'm not the top guy so I don't need to worry if I keep lying and I keep cheating and I keep sending in these false documents.

Mr. Miller did not cooperate. He did plead guilty and he did have a factual basis that certainly admitted to his conduct, but he doesn't have -- he doesn't get recognized for providing substantial assistance to the government. So there is no reason to vary down from the range we've gone up to. I believe that in Mr. Tucker's sentencing Your Honor said that absent his cooperation, that a 15 to 21 month sentence would be appropriate.

We want a sentence here that establishes respect for the law. You can't ignore the DBE regulations whether you like them or not. And this wasn't a case about not liking it. It was using it as a system to the advantage of Boggs Paving to get the contracts, to win the contracts. And the lies happened over and over again.

And I would just leave you with -- just to show this cavalier attitude that the defendants in this case and Mr. Miller took. Here's an email, it's Exhibit 20, where this is where they're bidding on the second small business job that they obtained in Styx's name and here's Greg Tucker sending an email to someone at Buckhorn and to Greg Miller. "How about sending a quote in Styx name." And they, in fact, win it by $52. And Greg Miller's response is, "Styx is a genius. Way to go GT."

This is something that -- I'm sorry, I see you were still looking at it.

THE COURT: I saw it.

MS. SUGAR: This is something that it was almost funny what was going on to the defense in this case and we need to show that this is serious. That individuals who participate in this, whether there's a CEO or not, face serious consequences and in the Western District of North Carolina they will be prosecuted and face serious consequences for this offense.

Based on all of these 3553(a) factors, we would ask for a low end of the 15 to 21 month range, Your Honor.

THE COURT: Mr. Fialko, what would you like for me to hear?

MR. FIALKO: Good afternoon, Your Honor.

A lot of what I'm going to say is in our sentencing memorandum, but I do want to highlight some of it again.

Greg Miller has been a loyal working man. He overcame serious alcohol and drug addiction and he's been living a day-by-day life. He's become a positive influence in his community despite his actions and his failings in this case.

As we noted, Your Honor, Greg overcame alcoholic parents. He went to community college up in the Hickory area.

And then he went to UNC Charlotte. Got his civil engineering degree there. And went to work for Dickerson Company for Andy Boggs way back when Jimmy Carter was president. And he's been working ever since. When Dickerson broke up, Boggs/Vaughn was started and Mr. Miller followed Andy Boggs there. And that was essentially a startup company as Nancy Bovender in her letter that was submitted to the Court described. And Greg learned this business from the bottom up.

As I've noted, his nickname in the company is Doc because of -- they call him the Doctor of Asphalt. He knows how to make asphalt like nobody else.

But alcoholism caught up with him, Your Honor. In the '80s he was a functioning alcoholic but still an alcoholic. And then he began to use cocaine. And as we noted in our sentencing memorandum, he did go in to rehab and was essentially given an ultimatum by Andy Boggs who thought of Greg as a valued employee, but someone who obviously had this addiction. And Greg Miller went. He actually tried to leave once from it and ran into his wife who was coming to visit him. He stayed and he's been sober now for 23-1/2 years one day at a time.

He has worked, as we noted, in the community significantly for a number of community organizations. He was on some committees for the United Way of Union County and then one of the pastors Paul Saleeby suggested that he might come and work for the Friendship House. Well, Greg knew the Friendship House because that's where Greg had gone to a great number of AA and NA meetings. And as Pastor Saleeby noted, Greg has been on their board, the Friendship Home, for a long time now and has been invaluable to them.

Greg also went through travails with his wife who battled breast cancer twice and the second one, 2009 and 2010, she lost that battle.

There's a great number of people here in support of Mr. Miller. I'd like to point them out, Your Honor. And this will just take a moment, but I would like to read their names.

And if you could stand as I read your name.

Is that all right with the Court?

THE COURT: That's fine.

MR. FIALKO: So Greg's daughter -- it's actually his wife's daughter, but Greg helped raise her -- Audra Tucker is here and her husband Joey. They came down from Raleigh.

His brother-in-law Ronnie Medlin is here who lives in Monroe.

Greg's godson James Whisnant, Jr., and his mother Sandy are here. They're from High Point. They drove down today.

There are -- and also -- excuse me. There are many number of people here from his church. Gary and Lynnitt Williams are here. Reverend Murdock is here. Tommy and

Connie Carlucci and Dina Dulan are all here in support of Greg.

Also his good friend Ron Harrison from Charlotte is here.

And probably Greg's best friend these days, Dr. Rocky Branch who was the minister at the church here and now is at Spruce Pine. And Rocky came to my client -- all of my client's hearings in support of him, including the plea hearing.

So, Your Honor, he's got a community that he's a valued member of and people who can support him.

I think the theme of the sentencing memorandum in this case was essentially twofold: His loyalty and his work ethic. I even quoted a Psalm which, you know, is unusual for me. I'm not the most religious person, but I quoted it more because it's in the Old Testament which has a lot of wisdom in it than a religious nature. The Psalm said, "Man goeth forth unto his work and to his labour until the evening." I found it by looking in Bartletts Familiar Quotations when I was trying to figure out some thoughts and wisdom about work. And that's what Greg Miller has done since 1978 is he's come to work every day that he could.

It's also since March 2nd of 1992, the first day of his sobriety, work is what's kept him sober, along with other things. And he has a significant fear, Your Honor, of that.

That if he's not going to be able to work, it will be harder for him to stay sober.

So along that theme of work, when Greg Tucker finally turned on Drew Boggs in July of last year while we were all in trial prep and when Kevin Hicks turned on Drew Boggs and pled guilty, it was finally time for Greg to do it and he did. And after he did, he asked me this question. He said, Do I have to quit working at Boggs Paving like Greg Tucker and Kevin Hicks did? And I discussed it with him and I didn't see a good reason for him to quit if he had work to do. And so we talked with Boggs and they needed him to complete projects that Mr. Tucker couldn't do, and he's been there now for another year and a half.

You mentioned you might, if this judgeship doesn't work out for you, establish a brick company and you could hire him because he will show up to work if you do that. That's what Greg's dignity is, it's in his work.

So the question is does he need to go to prison in this case? And, you know, there's three main goals of the sentencing statute:

Rehabilitation, which I don't think Greg needs.

Retribution, an eye for an eye, which isn't the case in this particular type of offense.

And so then there's deterrence. And deterrence has two parts, personal and general. And I don't think Greg needs any personal deterrence. He has no prior record of this and he has been taking this very seriously. So the general deterrence is what I wanted to talk about. And I have several thoughts about that, and they're in my memorandum as well.

The number one of them is that really the dynamic men behind Boggs Paving in 2009, '10, and '11 were Drew Boggs and Greg Tucker and Kevin Hicks. And if the Court is looking to set an example, it would seem to me to be the dynamic men, the three friends who went on hunting trips together and were on the up and up in the company while my client who's of a different generation was fading in the company.

The second is that when Greg Miller was out of the office for 16 months, Boggs Paving has been good to him for a long time and allowed him essentially to take a de facto leave of absence to care for Barbara, his wife, who went through many different types of treatment that was hard and difficult. But during that time period, the offense conduct continued unabated. Most of the documents that have been shown Friday and today occur actually in the 2009, '10 time period where my client was not present at the office on a daily basis.

Another thing I'd like you to think about is my client understands and accepts, and you'll hear from him in a minute, his responsibility and he understands conspiracy law. I've talked about it with him. He fully accepts what he's done and what he failed to do that helped this offense.

But as I see it, there were really three parts to the offense.

One was the bidding part, and that's where my client had a great role. He was the chief estimator for a long time before Greg Tucker took that job. In charge of making sure the estimates were right. And then, as you've heard, at the very end when there was a DBE needed for a small percentage, usually less than 5 percent, he put in Styx at the direction of Mr. Boggs. And he knew what he was doing.

But the other two parts of the offense he didn't have a role in that I could see in this case. One was the DBE reporting actually out of what was completed, and the other was what the government calls the nominee account and the flow of the money in and out of the BB&T Styx account. Whereas, for example, Mr. Tucker had a role in at least two parts of that. He was an estimator and bidder, but he also was certifying with Kristy Lawrence that Styx actually did that work.

Two more things, Your Honor, maybe three, about why you should vary down and not sentence my client to a term of imprisonment. One is the same that's been mentioned before from Mr. Tucker. My client did not earn profits or the spoils of this other than continuing to earn his salary and have his job.

The other is what I like to call now collateral punishments, not collateral consequences. There is a very real punishment to my client. He's debarred, he's suspended by the United States Department of Transportation. It will become a permanent suspension once we're done today and the DOT gets word of it, and I put that letter in the sentencing memorandum. He's not going to be able to work for a company that does this type of work unless all they need him for is to estimate and work on private jobs, which is a hard thing to do.

He also is a significant number of years older than Greg Tucker who has been able to find, apparently, a job. At 61 years old, my client is going to have much more difficulty doing that.

THE COURT: So in trying to show your client is different from Mr. Tucker, you're saying Mr. Tucker in addition to his cooperation is not being debarred?

MR. FIALKO: No, I think Mr. Tucker has been debarred as well, Your Honor. I think the letter has his name on it.

There is one more -- and in trying to distinguish, there is one more thought I have about distinguishing. Mr. Hicks hasn't been sentenced yet. I don't know whether -- we're not privy to the PSRs of co-defendants, but I don't know whether he's had any enhancement for abuse of position of private trust as a CFO, but it seems to me that my client was on the front end, but Mr. Tucker -- of the bidding, but Mr. Hicks had a significant opportunity as the CFO to put a stop to this and he didn't.

So, Your Honor, I understand the government has asked to move -- to upwardly depart and we object to that, but we understand it. I mean, I think you said consistently from the beginning, and as have I, that the loss amount figure is not a good proxy for culpability in this case. But I think six levels in his case may be too much, but also it's a little apples and oranges. I mean, maybe six levels is okay to go up if you're just talking about the loss amount. But if we're talking about other factors, I think a variance down is deserving for my client. He has community support. His role in this case was a worker every day directed by other -- by Mr. Boggs. As noted by Arnold Mann, one of the state's star witnesses, that Mr. Boggs diminished my client's role as much as he could because he was of a different generation. But as I put in my sentencing memorandum, one of the reasons was because Greg Miller often stood up to Drew Boggs, or tried to, and Drew didn't like that. And then eventually Mr. Tucker was named to my client's job.

So in conclusion, Your Honor, I'd ask you to vary downward, if you're going to vary up to level 14 as the government requests, back down to a level 10 and in the zone B range in this case and sentence my client to a term of probation with house arrest.

And it hasn't been talked about in the prior sentencing hearings, or not often in this courtroom or in our district, but in other federal districts, the Court has the opportunity to make a good thing happen which is to sentence my client to doing a significant number of community service hours. He has this addiction. He's been in recovery for a long time and he has skills that he can offer to the community by doing a hundred, two hundred or more community service hours off of a home detention sentence in this case.

In conclusion, Your Honor, you know, I suspect that sentencing is the hardest part of a judge's job. I don't envy it. But I think what you have to do now is weigh whether removing Greg Miller from the community, via imprisonment, and removing him from leading AA meetings like he does sometimes, removing him from caring for people in his church, removing him from showing up at out-of-town funerals as Rocky Branch said for church members, removing him from this Saturday morning breakfast that Ronnie Medlin talks about that he's been doing for many years with his wife's family, whether doing all of that is a reasonable sentence and whether it's necessary under 3553(a) in order to possibly, maybe, theoretically deter other companies or other workers from skirting the quota rules that have been set up by the U.S. Congress on DBE.

THE COURT: That's really what -- that's really what's moving the Court in this --

MR. FIALKO: I know.

THE COURT: -- is the general deterrence. I mean, we've got to stop people from -- if there's a carrot out there of 80 some million dollars in highway deals, people have got to follow the rules in order to get that. If it requires a DBE, then they've got to do it. I mean, you know, I know it's difficult to do and maybe it makes the bid more expensive. It shouldn't.

MR. FIALKO: Sure.

THE COURT: But the fact that they're trying to help minority and women-owned companies should not cost the taxpayer any more money. That is -- that's not a good thing. But they have -- how am I going to deter people if everybody thinks the worst thing that happens to you is probation?

MR. FIALKO: Well --

THE COURT: I realize the debarment from the field is a big deal. I'm not --

MR. FIALKO: It is.

THE COURT: I'm not discounting the fact that they can't work again in that business. But, you know, you wonder what businesses could be set up. What friends could hire him in different things and say they're not working on federal stuff, but who knows.

MR. FIALKO: But, Your Honor, I think, you know, you're supposed to figure out a sentence that's sufficient but not greater than necessary for my client here. And I understand that --

THE COURT: And general deterrence is part of it.

MR. FIALKO: No, no --

THE COURT: I mean, any time you're doing a sentence, you can't just look -- it would be great if you could just look at the defendant, but you've got to say what is this -- it's all the 3553 factors --

MR. FIALKO: Well --

THE COURT: -- that take into consideration the seriousness of the crime --

MR. FIALKO: Yes, sir.

THE COURT: -- the other available punishments and that sort of thing, and then deterring the defendant.

And I agree with you, most of these defendants are not going to offend again. They're all criminal history category I's. They're all -- I mean, some of the least criminal history I've ever seen. We have no loss in the case. But we do have a program that has been abused by -- over a period of time. And, I mean, what am I supposed to do?

MR. FIALKO: So what I was going to say when pointing out that you have to do a sentence sufficient but not greater than necessary for my client is that general deterrence is not best imposed here via my client. I think that the government has shown that Drew Boggs was the leader in this case, the owner in this case, and that things came top down from there. My client was very loyal to him and to his father especially, but that's the case. And I think that the community will understand deterrence through Mr. Boggs more than it will through my client.

So, Your Honor, you clearly know the ins and outs of this case in weighing this. What I'm saying to you is there is a significant amount of punishment that you can give to my client through what I'm asking for without him having to go to prison in this matter and that's what we ask. And Greg would like to speak briefly to Your Honor.

THE COURT: Okay. Thank you.

Yes, sir, Mr. Miller.

DEFENDANT MILLER: Your Honor, allocution is a word I never heard until my attorney had to explain it to me. I never had that in my vocabulary before. And, you know, after all these -- all these months and years of waiting on this -- on this sentence, on this moment, that has just, you know, laid heavy on my heart. You know, even the indictment on July 13 and the plea agreement July 14 and then waiting until now, but there was something about him explaining this to me that just, you know, set me, I guess, more in the moment, that just made me realize more than anything else that what was going on with this case and what's happening and how serious a situation that I got myself into.

You know, after -- after additional quiet time, reflection, you know, I came to the conclusion that speaking today and giving this allocution would not be a meaningless action and what I say will matter to you as the presiding judge of my fate.

As the Court knows, through my guilty plea I have accepted a plea to count one. And guilty I am. Many years of participation and many years of ignoring what was happening around me does not make me any less guilty. This only furthers the fact that I knew what was going on, stood by and did nothing about it. You know, therefore, I take full responsibility for my role in deceiving the South Carolina DOT, the North Carolina DOT, and other government agencies.

In addition, I want to acknowledge the underlying direct victims of the dollars received from the above entities. These are the numerous trucking firms with legitimate DBE status that were ignored and not given an opportunity to participate in the various contracts awarded to Boggs Paving. More specifically, my conduct prevented them from having even the slightest chance to perform hauling on our projects.

What I didn't know -- what I didn't have at the time of my illegal activity that I have now is a belief system that does not fail me. One of the more important things I've learned pertaining to my current situation is that I am to answer to all powers, all principalities, all governments. This knowledge came too little too late, and I personally failed in this respect also. This is a burden I now carry and have difficulty with on a regular basis. Through my ignorance, actions, deception, the victims are the ones who suffered.

I do have a particular skill set, I think, due to my history of drug and alcohol addiction and my recovery from the same has allowed me to be a big asset to AA and NA groups. At my current age of 61 years, I understand that life here is way too short and I have great opportunities to make a difference in the lives of others with the time I have left.

Your Honor, my life has been one of pride, self-consciousness, fear of failure, self-reliance, shyness, loneliness. This life has made me reclusive and one who follows the crowd, afraid to rock the boat. One where I never speak out for fear of rejection and one where I worry about what others may think of me.

These are the things that led me to my poor decision making and led me to the drug and alcohol addiction. That life has died and a new path has begun. So I now sit in your judgment seat and respectfully accept the outcome rendered.

And lastly, I'd just like to reiterate the main thing with this allocution is that I am responsible for the consequences of my actions. Thank you.

THE COURT: Yes, sir. Thank you.

Any comment from the government with regard to his role in the offense versus Mr. Tucker's?

MS. SUGAR: Well, Your Honor, as we've shown on the chart, we do believe that for the majority of the scheme, Mr. Miller was the superior to Mr. Tucker and that is supported by talking to the project managers. At the end, Mr. Tucker did take over Mr. Miller's role, but for the vast majority of the scheme, Mr. Miller was in a higher position in the company with regard to reporting directly to Mr. Boggs.

I do want to just comment about deterrence and the importance for respect for the law. We just can't have a system of laws where the people are more afraid of saying no to their boss than to not breaking the law. We can't have that system.

To have deterrence here, if you come in and you're someone who's had every opportunity in life and you say, Oh, I was just following what my boss said, that's not good enough. That's not going to deter others in the same situation. This is a case that calls for a prison sentence. Thank you.

THE COURT: Mr. Fialko. Anything else?

MR. FIALKO: I don't think so, Your Honor.

THE COURT: Okay.

All right. The Court does believe that the guideline range which is based on the loss amount understates the harm to the DBE program, and that is something that has to be looked at in doing the Court's sentencing. The Court said that it ultimately would do that and it will do what it has to do with regard to these -- to these sentences.

It's always a difficult -- sentencing is always a difficult thing, particularly sentencing individuals who are not otherwise but for their involvement in a crime that's, in this case, a nonviolent crime, not bad people. But you take on responsibility when you do this job; and although there are times that sentencing is easy due to what occurred, due to the type of thing that's done, these cases are hard. None of these are easy cases.

You know, the 3553 factors do, they have to promote respect for the law. They have to adequately punish the crime that has occurred. And they have to -- and as Mr. Fialko argues, and correctly, you know, you want a sentence that is sufficient but not greater than necessary.

The problem with this case is what do I do with deterrence in this case. Although the loss is zero, a contract for 80 some million dollars went to a company that may not have gotten that but for the way they handled the DBE thing. They may have gotten it anyway. I mean, Mr. Cuthbertson was qualified to be a DBE. But if he was a

DBE, he would have been a little bit harder to handle than the way he was handled and they may not have gotten that contract. So I don't really see any other way to do it.

The Court believes that the guideline range of offense level 14, criminal history category I more adequately deals with the harm that occurred in this case. Therefore, will vary upward to that range of 15 to 21 months and sentence there.

Pursuant to the Sentencing Reform Act of 1984 and *U.S. v. Booker*, it is the judgment of this Court, having considered the factors noted in 18, United States Code, Section 3553(a), that the defendant, Greg Miller, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 15 months.

The Court recommends that the Bureau of Prisons designate a facility near Monroe, North Carolina, for service of this sentence if it places the defendant in a traditional prison.

The Court further recommends that due to the nonviolent nature of this crime, the defendant's clean criminal record, defendant be considered for designation at a camp.

The Court further recommends defendant be allowed to participate in any educational and vocational opportunities while incarcerated.

Upon release from imprisonment, defendant shall be placed on supervised release for a term of two years.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state or local crime, and shall comply with the standard conditions that have been adopted by the Court in the Western District of North Carolina.

It's ordered defendant shall pay to the United States a special assessment of $100.

The Court finds the defendant does not have the ability to pay a fine or interest and, having considered the factors noted in 18, United States Code, Section 3572(a), will waive payment of a fine and interest in this case.

Defendant shall forfeit the defendant's interest in any properties identified by the United States if any exist.

Payment of the $100 criminal monetary penalty is due and payable immediately.

Mr. Fialko, is he going to be able to pay that?

MR. FIALKO: Yes, sir.

THE COURT: Since he's not going to have to go immediately into custody?

MR. FIALKO: Yes, sir.

THE COURT: Okay. That makes it a lot easier on -- if he ends up earning money there.

MR. FIALKO: Yes, sir.

THE COURT: Having money there, they're not taking it out. Okay.

I don't believe the defendant will be in there long enough to take advantage of any alcohol treatment or whatever reduction of sentence there.

MR. FIALKO: Well, Your Honor, it cannot harm to recommend it.

THE COURT: All right. Where is that -- where is that found? What's the -- I'm asking probation. Where would I find that?

MR. BAKER: I apologize, Your Honor, what's the question?

THE COURT: Alcohol treatment, possibility of getting some time off with his history of alcohol abuse.

MR. BAKER: Yes.

THE COURT: Where is that? I need to read that into the sentence. If you could find me the paragraph where I do that, I'll put that in the sentence.

MR. FIALKO: I think the simple phrase you need to put in there is you recommend him for the Residential Drug Abuse Treatment program, is usually the term.

THE COURT: I think he'll be better at the camp if he gets one.

MR. FIALKO: I think you're right.

MR. BAKER: I'm going to have to pull another report up.

THE COURT: Okay.

MR. FIALKO: May I approach the court reporter?

THE COURT: Sure.

(Document tendered to the court reporter.)

THE COURT: The Court calls to the attention of the custodial authorities that the defendant has a history of substance abuse and recommends the defendant be allowed to participate in any available substance abuse treatment programs while incarcerated and, if eligible, receive the benefit of 18, United States Code, Section 3621(e)(2).

All right. Is there any legal reason why this should not be the sentence in this case from the defense?

MR. FIALKO: No, sir.

THE COURT: From the government?

MS. SUGAR: No, Your Honor.

THE COURT: All right. That is the sentence in this case.

Mr. Miller, you have a right to appeal this conviction and sentence to the Fourth Circuit Court of Appeals. Any notice of appeal must be filed in writing within 14 days from when I enter the written judgment. I've just entered an oral judgment today. There will be a written judgment and statement of reasons which will be filed in this case. Within 14 days of that, you have to give a written notice of appeal. If you cannot afford to appeal and wish to appeal, you can appeal at government expense.

I would suggest you speak to your very able attorney about whether in this circumstance you wish to exercise that right to appeal, but do you understand your right to appeal as I have just explained it to you?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Okay. Thank you.

Anything further from the defense?

MR. FIALKO: We move that he be allowed to self-surrender, Your Honor.

THE COURT: Anything from the government on that?

MS. SUGAR: We don't oppose that.

THE COURT: Defendant will be allowed to self-surrender at his own expense to the -- to a facility once it is designated by the Bureau of Prisons.

And, Mr. Miller, you need to -- it's a good thing that you get this, but you got to be there on time. In other words, if they tell you to be there at 5:00 on a certain day, you can't be a flat tire away from missing that 5:00 deadline. Get an early start and be in the vicinity of the -- when the time comes because if you don't show up when you're supposed to, they think you've escaped and they may put you in a different facility and you have an opportunity, probably, because of your past lack of criminal record of getting a decent facility, a good facility. Don't mess that up on the failure to report.

DEFENDANT MILLER: Thank you.

THE COURT: Okay?

DEFENDANT MILLER: Yes, sir.

THE COURT: All right. This matter is concluded. Thank you.

Oh, remaining counts.

MS. SUGAR: Your Honor, we move to dismiss all the remaining counts against this defendant.

THE COURT: Let them be dismissed.

(End of proceedings at 2:18 p.m.)

THE COURT: All right. We'll call the case of the United States versus Kevin Hicks.

Is the defendant ready?

MR. WINIKER: Your Honor, he is.

THE COURT: Is the government ready?

MS. SUGAR: Yes, Your Honor.

THE COURT: Mr. Hicks, do you recall appearing before a United States magistrate judge for the purpose of entering a plea of guilty in this case?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: Do you remember being placed under oath at that time?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: And do you remember answering the questions of the judge?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: Do you remember signing a plea transcript form indicating the answers you gave the judge that day were true and accurate to the best of your knowledge?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: Did you tell the judge the truth that day?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: If I were to ask you the same questions, would your answers be the same today?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: All right. Thank you. Counsel, do you believe your client understood fully the questions asked by the magistrate judge at the Rule 11 hearing?

MR. WINIKER: I do, Your Honor.

THE COURT: All right. Mr. Hicks, one more question for you. Did you answer the questions the way you did and are you going forward with your guilty plea today because you did commit the crime you're pleading guilty to?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: Based upon those representations and the answers given by the defendant at the Rule 11 hearing before the magistrate judge, the Court affirms the judge's finding that the defendant's plea was knowingly and voluntarily made. The Court also affirms the judge's finding that the defendant understood the charges, the potential penalties, and the consequences of his plea. Accordingly, the Court affirms the magistrate judge's acceptance of the defendant's plea of guilty at the Rule 11 hearing and accepts that plea today.

All right. Ms. Sugar, would the government have a factual basis in this case?

MS. SUGAR: Your Honor, the parties have filed a factual basis and it has been adopted in the presentence report. We would stipulate to that factual basis.

MR. WINIKER: As would the defendant, Your Honor.

THE COURT: Thank you. Based upon that stipulation and the offense conduct as set forth in the presentence report, the defendant's plea of guilty before the magistrate judge, and the defendant's admissions in open court today, the Court finds there is a factual basis for the entry of the plea of guilty and enters a verdict and judgment of guilty in this case.

Mr. Hicks, your case was referred to the United States Probation Office for a presentence investigation and the preparation of a presentence report. The Court has now received that report. Have you read that report?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: Have you gone over that report with your attorney?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: Do you now believe you understand the contents of that report?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: Thank you.

Mr. Winiker, have you gone over that report with your client and do you believe he understands the contents of that report?

MR. WINIKER: I have and I do, Your Honor.

THE COURT: All right. Thank you. And are there any objections to the presentence report which remain outstanding at this time?

MR. WINIKER: There are not, especially given the government's -- the Court's ruling as to loss.

THE COURT: Right. And with regard to the government, except for the Court's ruling with regard to how much the loss was, is there any other objection outstanding at this time?

MS. SUGAR: No, Your Honor.

THE COURT: All right. Then the Court will adopt the information contained in the presentence report for the purpose of applying the guidelines with the addition that the Court has ruled with regard to a different loss amount than was in the presentence report.

Is this an 8 and a I?

MR. BAKER: This is a 10 and a I.

THE COURT: Oh, a 10 and a I. Thank you.

In the instant case, the advisory guidelines provide for a total offense level of 10, a criminal history category of I, and a guideline sentencing range of 6 to 12 months. Does the defense agree?

MR. WINIKER: I believe I do. I wanted to look at that range one more time.

THE COURT: Take your time.

MR. WINIKER: Your Honor, I do. Ordinarily it would have been a three-level reduction originally, but with the two-level reduction given the Court's ruling --

THE COURT: Given the Court's ruling, it got down below the three-level reduction allowed so you only get two.

MR. WINIKER: No objection.

THE COURT: Okay. Thank you.

Any objections from the government at this time other than the amount of loss issue?

MS. SUGAR: No, Your Honor.

THE COURT: Okay. Thank you.

All right. Then that is the correct guideline range.

I'll hear from the government with regard to what the appropriate punishment is based upon the 3553 factors in this case.

MS. SUGAR: Thank you, Your Honor.

THE COURT: And any motions that the government may be making for a downward departure following any variances the government asks for. The Court will be -- will entertain that also.

MS. SUGAR: Yes, Your Honor, we'll be making both.

First, we would move for a six-level upward variance due to the loss range not reflecting the conduct in this case and the harm to the DBE program. But joint in that, we would move for a 5K motion of five levels for Mr. Hicks down to a level 11, which would put him in zone B consistent with the terms of his plea agreement and his cooperation with the United States.

Now, certainly I do want to note, it's important for the Court to know, Mr. Hicks falls higher than Mr. Tucker did because he has a two-level bump for the money laundering. Mr. Hicks was the CFO for the bulk of this time period and his role was very different than the project managers. He was not in the bid meetings. He was the guy signing the two checks to Styx Cuthbertson that were going out every two weeks. He signed two and then he got an email back from the woman under him that said this is how much we're getting back from Styx. So every two weeks he writes two checks: One usually bigger, mostly comes back, and one much smaller for Styx. And he did this for years. His name was on the nominee bank account, as was the CFO before him and the CFO before him. And he reported directly to Drew Boggs.

And Mr. Hicks and Mr. Tucker came in to cooperate with the government around the same time. And we believe that although Mr. Tucker certainly has testified, that put him at a different position vis-a-vis his cooperation and the value of it, Mr. Hicks was key because he connected Mr. Boggs to that financial part of the case, to the accounting.

Each part of the company worked together to make things work in this fraud and Mr. Hicks had a very important role with the signing of checks and the moving of money. There's no way from an accounting standpoint you write someone a check for them to write it to you back and you do it over and over again. They were clearly trying to make the books change so it looks like Styx had done more work or had been paid more than he actually had. That way they had checks they could show DOT. That way they had invoices they could show DOT even though the work hadn't been done.

Being a CFO is certainly an important job and comes with a lot of responsibility and obligations to be truthful, and Mr. Hicks violated that trust when he participated in the money laundering and in the DBE fraud scheme.

But I think it is fair that he, because of his background, had less knowledge of the DBE rules, although this was clearly on its face not correct what was happening. And he wasn't in the meetings where they were writing in Styx. That wasn't part of his job.

But we think that -- he definitely needs a higher sentence than Greg Tucker. I think that that money laundering difference is important and it's important to the government. Eight to 14 months gives you a sufficient range in the different ways that you can impose a sentence that's going to let CFOs know even if you come in and cooperate, and he does certainly get credit for that, that this is a real crime. There's real victims. There's real harm here. That just going along with what your supervisor does is not okay. That there are real severe consequences for this conduct that went on for years and years. Every two weeks the checks. Every two weeks the checks.

And we need the sentence here to promote respect for the law and give deterrence. And we do think that that would ordinarily here be the level 16, the 21 to 27 months. But due to his cooperation, due to his coming in and talking to the government, both initially during trial preparation and as recently as this week, we would ask for that departure. And we do believe that the range of 8 to 14 months is the appropriate level to sentence the defendant, recognizing the seriousness of the offense while also giving him credit for the substantial cooperation he has provided to us.

THE COURT: All right. Are you seeking a particular sentence in that range?

MS. SUGAR: We do think that a term of some type of confinement is appropriate.

THE COURT: Well, that range would call for some kind of confinement.

MS. SUGAR: Yes.

THE COURT: It would allow for home detention also.

MS. SUGAR: It does, Your Honor. We would just say that we do think there should be confinement and 8 to 14 months is the appropriate amount of such confinement. Other than that we would defer to the Court.

THE COURT: All right. Thank you.

MR. WINIKER: I stand and breathe a sigh of relief, Your Honor. I didn't know what I was going to be arguing until moments ago given all of the moving parts that have been in this case so far in terms of at least the government's recommendation. Let me go in -- for a moment in terms of my client's history and background and those other factors.

But just coming off -- just to begin with, at 9:00 this morning the government's recommendation in this case, given the original government finding of loss amount and the plea that was entered by my client a year and a half ago, put him at a rage of 4 to 14 months in zone B. Now, after the Court having found a significant reduction in that loss amount, the government's recommendation is now higher. And so that's where we are today.

Your Honor, my client is a native of Jackson, Mississippi. Went to school there. He's a little -- not a ton younger than me, but a little bit younger than me. Went to -- got an accounting degree in college. Met his wife there. Started working at a construction firm that didn't do any kind of government work. No DBE work or anything like that. Basically working in the finance department. Combination of data entry and, you know, not much more than that. A little bit more than data entry, but essentially working in that area.

But finally was recruited for a bigger position. Saw an advertisement that was posted. Came and interviewed with Drew Boggs here in 2003, and that's when he was offered the position. Took his wife and his then very young family -- he had -- I believe his daughter was probably about four years old, maybe even just born at that time. She's now 13. And so came and took that job. Moved out to Monroe. Started working there. So it's just basically this young family, just those three.

And as the Court knows, what Mr. Hicks walked into was a company that had existed at least since the mid '90s. You had Greg Miller who the Court just heard from. And ordinarily I don't like to talk about other co-defendants at a sentencing like this, but the problem is is that I don't want the Court to get a misapprehension as to both Mr. Hicks' role in the offense and also the history how he fits into the history of the company.

Kristy Lawrence, whose grand jury testimony we heard snippets of, had already been trained by her predecessors and had already been also having contact with project managers a year before Mr. Hicks was hired as CFO. This Styx bank account that was talked about, that had existed since the mid '90s. I would argue it would be someone, Mr. Miller, who's more conversant with the way this company was formed from the beginning, that's where this scheme derived from.

So just so the Court is very clear that while my client absolutely accepts responsibility, and you'll hear from him on that and you'll hear from me a little bit more on that for a moment, this scheme didn't start with him. It wasn't presented to him to be orchestrated. He came, started working for this company, and this was -- this was a train that had already left the station.

My client -- my client's job primarily focused on bigger picture items such as dealing with the company's primary lender, Cat, dealing with the company's surety, dealing with the company's other lenders in this case. And essentially kind of putting out fire to fire to fire every single day for the last dozen years just about.

Your Honor, this is a man who was essentially described by his wife as a workaholic, and both his job and, quite honestly, this case nearly cost him his life. The day the indictment came out in this case, he suffered massive heart failure. His wife Jennifer, who is here, Your Honor, and has told me she is mortified of speaking for a number of different reasons. One, it's very difficult for her to speak; but second, she doesn't believe she can get two words out without bursting into tears. And having met and talked with her on many times over the course of the last several years, I would say that that's true. She's an ardent supporter of her husband. She wrote, I think, a very eloquent letter that I'm sure the Court has reviewed. But in that she describes finding him that day in July gasping for breath on the kitchen counter. He had to wear a defibrillator for six months after that, a vest that he had to wear. And was at one time, they were looking at whether or not he should be on the heart transplant list and he was being prepped for that procedure.

Your Honor, he has recovered from the event, but when I say recovered, he can be struck with the same malady pretty much any time, and that I think is a significant factor I ask the Court to take into account in this case in determining -- especially if the Court determines that some period of confinement is important, that this has been through regularly seeing his doctors, very carefully controlled medication and carefully controlled diet, which even when he was hospitalized, he couldn't eat the hospital -- the low sodium hospital food. His cardiologist said it was too high in sodium at the time. So the diet and every bit of his health at this point needs to be carefully monitored less he succumb to the same event soon.

Your Honor, I want to take a moment now to recognize his family who's here.

And if you can please stand.

I wanted to introduce his mother and father, Margaret and Kevin Hicks, at the end. His sister Bonney Henderson is here. I'll ask the Court to hear from her in just a moment. And also his brothers Alan and Matt Hicks. Of course, his lovely wife Jennifer. Thank you very much.

Your Honor, they both traveled in from out of town to be here today. It has -- I think in terms of talking about his conduct in this matter and falling into it, the Court did hear that Drew Boggs took Greg Tucker and also Kevin Hicks on trips. He was considered a friend. It was just Kevin and his wife here in Charlotte and he was sort of taken under their wing. And like many other employees in the company, the loyalty was cultivated. And if anything, it probably, in my opinion anyway -- I don't know that Kevin has ever said this, but I think it could have led to clouding his judgment a bit in terms of trusting the people around him. Not imagining that people around him could be involved in this kind of a scheme.

Now, on paper and looking at what he -- you know, the items he looked at, he will tell you, absolutely, that is not the kind of conduct that he thinks is appropriate. But remember, he was not involved in overseeing the submission of DBE reports like Greg Tucker was. He didn't develop invoices. He didn't write Styx in the contracts. What he was aware of is that Styx was essentially -- and this is his sin -- that Styx was an in-house DBE. That his -- the DBE reports were important for the company to be paid. And that the movement of money was designed to help support that. But beyond that he didn't know about DBE regulations, how they worked, trucks being substituted. Other than maybe being copied on some emails, that was not part of his job, and certainly nothing he looked at and for that.

And then finally, after having carefully examined the evidence in this case and given his limited role, the fact that he was guilty of this offense, we -- Mr. Hicks did not know Mr. Tucker was talking to the government at the same time. But Mr. Hicks came to the government, worked out and tendered his guilty plea independent of that. Though Arnold

Mann had pleaded guilty previously, I would argue that really -- that didn't -- I know that that didn't have any impact -- or any great impact on Mr. Hicks' decision in this case.

He was -- the Court heard from Mr. Tucker, but Mr. Hicks' role in this company is sort of like the two sides of Janus. Tucker was the project manager side, the project managers who interacted directly with both DOT and with the staff who entered in these reports and submitted them to DOT. Mr. Hicks -- Mr. Hicks' side greatly assisted the government in being able to provide them a witness to authenticate any and all of the financial records that they would need to introduce at a trial. And I would argue were it not for Mr. Hicks' cooperation, there's a substantial reason to think that this case might not have ended the way it did today. And I would argue to the Court that his cooperation was extremely substantial in this matter.

Your Honor, he's been unemployed for the last year. He has a money laundering conviction as an accountant. He was able to finally find a job with an HVAC firm a little bit less than a month ago. They are aware of the nature of his case right now and it is a testament to Mr. Hicks and as well as the trust of this company, and the Court, I'm sure, has read the letter of support written by his employer, after a very short period of time how impressive Mr. Hicks has been in terms of the way he works, the way he works very hard and his fierce loyalty.

Your Honor, before -- I will have a few closing remarks, but let me very quickly ask his brother to come forward. He wanted to say a few words on his behalf.

If you can just step right here.

MR. MATTHEW HICKS: Good afternoon, Your Honor. I'm Matthew Hicks. I'm here today from Greenwood, Mississippi, in support of Kevin Hicks who is my older brother.

I've known Kevin all of my life so I can say without hesitation that Kevin is a good and decent man. He's someone that I've looked up to not just as a big brother, but as a person. Kevin possesses a number of good qualities and traits that I've always had a lot of respect for, one of which is his very strong work ethic. A lot of people probably don't realize this, but he's held a steady job since he was 15 years old. I think in today's time that speaks a lot about him and is pretty impressive, especially given the fact that with the last few years he's had a very serious medical condition.

Kevin and I, even though we live in different states, we're still very close. Kevin's the person that if I'm in a situation where I need advice or guidance, I regularly go to Kevin for that. I can honestly say that a lot of the advice and guidance that he's given me in regards to developing my career have been invaluable. So I can honestly say that I look up to Kevin for that.

I also have found Kevin to be very instrumental in how I've gone about raising my daughter. Kevin and I have a similar situation with our families in that both he -- both my wife and I have just one child. We have a daughter. And I've seen the way that Kevin has gone about raising his daughter, and I've tried to model how I raise my daughter after how he's done it because he's done a terrific job with it.

Lastly, I just want to say that Kevin is someone -- he's not perfect, but he's someone that I always have and always will look up to and I always will be proud to call him my brother.

Thank you very much for your time today, Your Honor.

THE COURT: Yes, sir. Thank you.

MR. BELL: Your Honor, his sister might say a few words.

MS. BONNEY HENDERSON: Hi, I'm Bonney Henderson and Kevin is my brother. Kevin and I are just two years apart. We have always been close. We played on the same high school tennis team. We were even partners at times. We were both at Mississippi State during the same time, which is where Kevin introduced me to my husband whom I've been married to for 18 years and share three children with.

Thirteen years ago my husband and I chose Kevin to be the godfather of our first child. This is not a decision that we took lightly, but we chose Kevin because of his family values and his good character. And if I had to make that decision all over again today, I wouldn't do anything differently on choosing him again.

He's extremely dedicated to his wife Jennifer and their 13-year-old daughter Neely. The bond that Kevin and Neely share is simply incredible. It's so obvious just how much Neely adores her dad and she needs him very much.

Shortly after Kevin was diagnosed with heart failure, my husband and I drove our children from Mississippi to North Carolina to spend Thanksgiving with Kevin and their family. They had been so busy in meeting with doctors and simply trying to adjust with the many restrictions that come with any heart failure patient. I'm so proud of how Kevin has handled these restrictions with his health. He knows how important it is for him to obey his doctors' orders and that's exactly what he's doing.

So that Thanksgiving I told him I would make a heart healthy Thanksgiving meal for all of us. That is no easy task, but together we did it. Jennifer and Neely watched my every move in the kitchen to make sure I didn't put a pinch of salt in anything or serve anything that might make Kevin sick. We had a bland meal that day, but it was a wonderful Thanksgiving.

My point is this. Kevin is a good man. He has a family that loves him and supports him and they depend on him. And our entire family is here today to show support for Kevin. And I respectfully ask that you grant Kevin a second chance so that he can continue to raise his daughter, earn a living for his family, and be a productive member of society. I know he will not let us down. Thank you.

THE COURT: Thank you.

MR. WINIKER: Thank you.

Your Honor, I will close with a few words, but my client would like to address the Court at this time.

THE COURT: Okay.

DEFENDANT HICKS: Your Honor, I'd just like to say that, you know, I acknowledge that I made a terrible mistake in my actions in regards to this case that I deeply regret. And sadly, it has caused me to have to learn an extremely painful lesson, a lesson that I will never soon forget for the rest of my life. I basically -- this whole experience has reminded me to take more caution in my job and make sure that anything that comes across my desk is up and up and perfectly good with any requirement that's needed of it.

And I'd just like to say that I'm sorry especially to my family who has been inadvertently hurt because of all this, because of a poor course of judgment on my behalf.

So thank you for your time.

MR. WINIKER: Your Honor, if I may. May I approach?

THE COURT: Yes, sir.

(The document was tendered to the Court.)

MR. WINIKER: Your Honor, that's a page out of the -- out of the government's discovery obtained from what I imagine was at some point a grand jury production of the company. But, Your Honor, in terms of where this company was, this was -- this was a company that was sort of passed down from Drew's father Andy, and Greg Miller was essentially the Dick Cheney of the operation, and that is, you know, an older seasoned hand coming on board with Drew. That is how this matter operated. Whatever -- however this scheme was conceived was conceived before my client was there.

And subsequent to that, he's done everything in his power to do the right thing. And given the circumstances and the isolation of him and his family, he made an extremely tough call. He provided spectacular assistance to the United States in terms of his role in the offense and, you know, his -- the position that they needed him for in any potential trial.

Your Honor, he is a valuable member of the community, a valuable member to his family. He has significant health issues. And I would ask the Court to take all of that into consideration and to -- you know, Your Honor, I had asked in the sentencing memo for some term that included home confinement, and I ask that the Court impose nothing more than that. But I would argue given the sentence that has already been given to Greg Tucker, I would argue that he had -- he earned the same salary Mr. Tucker did. Mr. Tucker had a bigger role, had more contact with DBE reporting, and Mr. Hicks' cooperation was just as valuable.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Okay. The Court will go through the exercise of agreeing with the extra two levels. That the appropriate sentencing range would be found at offense level 16, criminal history category 1, 21 to 27 months.

Recognizing that if the Court goes down into the zone B, the Court could go to the 4 -- hearing that it was originally 4 to 14, could go down to 9 and have home confinement. But I'm afraid that would work the probation office harder than the defendant in this case.

So the Court is going to, based on the full cooperation of the defendant in this case, is going to -- under 5K is going to depart down for the substantial assistance of the defendant to total offense level 8, criminal history category I, and sentence there considering all those factors.

Everybody in this case is lucky that there was not a loss to the government in this case, financial. We have to recognize that immediately up front. Zero money lost. But the government was protecting -- the reason the government is bringing this case is the government is protecting the Disadvantaged Business Enterprises which is a laudable program and needs to be protected.

Pursuant to the Sentencing Reform Act of 1984 and *U.S. v. Booker*, it is the judgment of the Court, having considered the factors noted in 18, United States Code, Section 3553(a), that the defendant, Kevin Hicks, is hereby placed on probation for a term of two years.

While on probation the defendant shall not commit another federal, state or local crime.

Shall comply with the standard conditions that have been adopted by the Court in the Western District of North Carolina, and shall comply with the following conditions:

And that is that defendant is ordered to pay a special assessment of $200.

And is to forfeit any interest the defendant has in any properties identified by the United States.

MR. BAKER: Your Honor, is the probation going to be run concurrent between both counts?

THE COURT: Yeah. Thank you very much. It's the same sentence on both and these sentences are going to be concurrent to one another.

Could you approach one minute. I want to ask you a question.

(The Court and the probation officer conferred.)

THE COURT: As part of this sentence, defendant is ordered to pay a fine in the amount of $2,000.

The $200 is payable immediately -- the $200 special assessment is due immediately.

The $2,000 can be paid in monthly installments of $100 each to begin within 60 days of going on supervision.

Anything further that I'm missing from the government?

MS. SUGAR: No, Your Honor.

THE COURT: I think I've got everything covered.

Is there any legal reason why this should not be the sentence in this case from the defense?

MR. WINIKER: No, Your Honor.

THE COURT: From the government?

MS. SUGAR: No, Your Honor.

THE COURT: All right. That is the sentence in this case.

Mr. Hicks, you can appeal this conviction and sentence to the Fourth Circuit Court of Appeals. Any appeal must be done in writing and must be done within 14 days from when I enter the written judgment in this case. If you wish to appeal and cannot afford to appeal, you may appeal at government expense.

I would suggest you speak to very able counsel about this -- these rights to appeal and as to whether in this circumstance you wish to exercise those rights, but do you understand your rights as I just explained them to you?

DEFENDANT HICKS: Yes, Your Honor.

THE COURT: Thank you.

Anything further from the defense at this time?

MR. WINIKER: Nothing from the defense. Thank you, Your Honor.

THE COURT: From the government?

MS. SUGAR: Yes. We would move to dismiss the remaining counts as to this defendant.

THE COURT: Let those be dismissed.

MR. WINIKER: Thank you.

THE COURT: Thank you.

(End of proceedings at 2:53 p.m.)

THE COURT: All right. We're going to take a brief recess before we go into the next two sentencings, so we'll be in recess for about 10, 15 minutes.

MR. BELL: Your Honor, while you're recessing, may I hand up some character letters?

THE COURT: You may.

THE COURT: It will help eat up my recess, but that's all right.

(Documents were tendered to the Court.)

(Brief recess at 2:53 p.m. Court resumed at 3:05

p.m.)

THE COURT: All right. We'll call the case of -- yes, sir.

MR. SAVAGE: Your Honor, if there is no preference or difference to the Court or the defendants, the government requests that we maybe do the sentencing for the organization first. That would give Ms. Sugar a break. But also, there's a provision in the guidelines that would require that -- the Court could impose part of the fine for the corporation, in a closely held corporation, on the principal defendant who is also an owner.

So for that reason, if it's not anybody else's deference, we'd prefer to go with Boggs Paving, Inc. next.

THE COURT: All right. Let's do that unless there's a good objection for it. Let's go ahead and do that.

What we will do, then, is call the case of the United States versus Boggs Paving, Inc.

Who do we have here as corporate representatives?

MR. GALYEAN: Your Honor, James Galyean of Nexsen Pruet -- from Nexsen Pruet for Boggs Paving and Mr. Boggs standing in for the company.

MR. SAVAGE: Your Honor, if I might maybe outline the direction. Obviously, the Court has the thing, but I thought that we might want to establish the statutory guidelines for the offense.

THE COURT: Okay.

MR. SAVAGE: Then, of course, there's the matter of which guidelines apply, which we believe would be the 2014 guidelines.

Then I think there are the arguments under the -- arguments and some of them -- I know that Mr. Bell had contested the government's sentencing memorandum and we had evidence to present on that.

THE COURT: All right. Why don't you go ahead and proceed, then.

MR. SAVAGE: Okay. Does Your Honor need to do the plea colloquy thing?

THE COURT: Well, I guess I probably should.

MR. SAVAGE: Yeah, with the defendant.

THE COURT: It's kind of odd to do one on a corporation. I know Mr. Boggs is here for the corporation, but as I opined before --

MR. SAVAGE: Yes, Your Honor.

THE COURT: -- it's a little strange that you can't -- that the corporation is a person and it can be -- it can't be put in jail, doesn't have a soul and a lot of other things, but...

MR. SAVAGE: It has money.

THE COURT: It does have money. It does have money.

All right. Please stand.

Mr. Boggs, did you -- were you the person that appeared before a United States magistrate judge for the purpose of entering a plea of guilty for Boggs Paving, Inc.?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Were you placed under oath at that time?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Do you remember answering the questions of the judge that day?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Do you remember signing a plea transcript form indicating the answers you gave on behalf of Boggs Paving, Inc., were true and accurate at the time they were given?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Did you tell the judge the truth that day?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: If I were to ask you the same questions today, would your answers be the same?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: All right. Thank you.

Counsel, do you believe your client understood fully the questions the magistrate judge asked at the Rule 11 hearing --

MR. GALYEAN: I do, Your Honor.

THE COURT: -- on behalf of Boggs Paving, Inc.?

MR. GALYEAN: I do, Your Honor.

THE COURT: Thank you.

Mr. Boggs, did you answer the questions the way you did on behalf of Boggs Paving, Inc., and are you going forward with Boggs Paving, Inc.'s, guilty plea today because Boggs Paving, Inc., did commit the crime --

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: -- that it is pleading guilty to?

DEFENDANT BOGGS: Yes, sir.

THE COURT: All right. Then based upon those representations and the answers given by the defendant at the Rule 11 hearing before the magistrate judge -- or given by Mr. Boggs, the principal of Boggs Paving, Inc., before the magistrate judge, the Court affirms the judge's finding that the defendant's plea was knowingly and voluntarily made. The court also affirms the judge's finding that the -- that Mr. Boggs understood on behalf of the company the charges, the potential penalties, and the consequences of his plea. Accordingly, the Court affirms the magistrate judge's acceptance of defendant Boggs Paving, Inc.'s, plea of guilty at the Rule 11 hearing and accepts same today.

Ms. Sugar, would the government have -- or Mr. Savage, would the government have a factual basis?

MR. SAVAGE: Yes, Your Honor. The government would stipulate -- the defendant corporation pled guilty without the benefit of a plea agreement but submitted a factual resume, as did the government. The government would stipulate to the factual basis in the presentence report, noting, of course, its objections to loss amount.

THE COURT: Right. Yes, sir.

What says the defense?

MR. GALYEAN: Your Honor, we would do the same.

THE COURT: All right. Then based upon that stipulation and the offense conduct as set forth in the presentence report, the defendant's plea of guilty before the magistrate judge, and the defendant's admissions in open -- and the defendant's admissions -- or Mr. Boggs' admissions on behalf of the defendant Boggs Paving, Inc., in open court today, the Court finds there is a factual basis for the entry of the plea of guilty and enters a verdict and judgment of guilty against Boggs Paving, Inc., in this case.

All right. Mr. Boggs, your company's case was referred to the United States -- was this case sent to probation to fill out this too?

MR. GALYEAN: That's my understanding, Your Honor.

MR. BAKER: Yes, Your Honor.

THE COURT: Okay. And there is a presentence report and the Court's received that report.

Have you read that report?

MR. GALYEAN: Yes, Your Honor.

THE COURT: Have you gone over that report with your lawyer?

DEFENDANT BOGGS: Yes, sir. I believe we've -- I think we've submitted some objections, I believe.

MR. GALYEAN: No, Your Honor, we have no objections to the presentence report.

THE COURT: No objections from the company. Okay. So are there any -- do you believe you understand the contents of the report after talking to the lawyer?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Okay. Are you satisfied on behalf of the company he understands the contents of that report and its implications for his company?

MR. GALYEAN: Yes, Your Honor.

THE COURT: All right. Any objections to the presentence report which remain outstanding today?

MR. SAVAGE: Not other than loss, Your Honor.

MR. GALYEAN: None from the defense, Your Honor.

THE COURT: All right. Very good.

All right. Then the Court will adopt the information contained in the presentence report for the purpose of applying the guidelines in this case except for the loss.

Where are we with the company now?

MR. BAKER: With the company now, Your Honor, the offense level would be 11. And as far as the culpability score, that would remain the same. The fine range computation based on the 37,000, using the multipliers, would create a fine range of $51,800 to $103,600.

THE COURT: Okay. Does the defense agree?

MR. GALYEAN: Yes, Your Honor.

THE COURT: Does the government agree?

MR. SAVAGE: Yes, Your Honor.

THE COURT: Okay. All right. I'll hear from the government on sentencing and what we should do.

MR. SAVAGE: Your Honor, I'm going to direct the Court's attention in this case to Section 3571 of the code. If the Court's familiar with that, that is with regards to the imposition of a fine on a corporation.

As the Court noted, and as the guidelines provide, a corporation does not have a soul. It does not have -- it cannot operate except through its people.

THE COURT: But it can make political contributions apparently.

MR. SAVAGE: It can, indeed, make political contributions.

THE COURT: Because it's a person.

MR. SAVAGE: It cannot make direct political contributions, but it can make some.

THE COURT: It reaches into that big corporate pocket with its big corporate hand and...

MR. SAVAGE: Yes, Your Honor. But that would be for another day.

But I would direct the Court to the sentencing, I think we did in our sentencing memo, to the purposes of sentencing a corporation and that is, I think, to promote respect for the law. Corporations don't have a soul, but they do operate under a legal format. And I think in a corporation like this that has existed for so many years in disobeyance of the law and, as you said -- noted, gathered $87 million in federal contracts, of which 300 -- 3.7 million was supposed to go to DBEs such as Mr. Styx who would have benefited from it if they had actually received that money and grew their businesses.

We find ourselves in a dilemma here because perhaps 3.7 million, or as we argued in our brief, 7 million would have been appropriate. But I think that the court now is going to be -- this is where the loss calculation has a real, real implication. And that is, the maximum fine for the offense to which this corporation pled guilty is $500,000 under Section 3571(C)(3). So the most this Court could impose on a corporation that's gotten $87 million worth of contracts, laundered $7 million through its accounts and, based on the accounting of the accountant for which they paid $125,000 for, is $500,000.

THE COURT: The Court understands the implications of the --

MR. SAVAGE: The alternative fine would have been based on (D) --

THE COURT: -- guidelines -- the fact that the guidelines were done the way they were done. The Court understands that implication.

MR. SAVAGE: Exactly.

THE COURT: It has strained over that for a long time.

MR. SAVAGE: Exactly.

So I don't think that the Court could or maybe is inclined to, and I don't want to rehash that, but we could go back into loss amount solely for this corporation, but I think that that would be a waste of time. The Court has noted our objection.

But I wanted to say that but for the fact that the loss in this case or the gain as would have been provided under 3571(D), we think it's much greater than $37,000. We would have asked for a much higher fine, somewhere in the $7 million range, because that would truly reflect the harm this corporation caused.

But that being said, the most that you can impose is $500,000. Therefore, if you took and worked backwards into that, if you take the multiplier of 1.4, you divide 400,000 -- that into 500,000, we would suggest that a departure on the base fine somewhere in the amount of -- if you go to -- if I might do the math one more time.

A fine of $357,000 which would require the Court to depart 7 levels to offense level 18. If the Court were to depart to offense level 18, impose a fine of $350,000, and multiply that by the amount that would be in the multiplier factor of approximately 1.4, it would come up with a statutory maximum penalty of $500,000.

THE COURT: Let me ask the government, what kind of -- what do you -- what are you doing about forfeitures of the company? Because it's all -- I mean, this is a total punishment situation here. It's not, well, we're going to take this from them here, this from them here; and once we get it all, we're going to sow the earth with salt so nothing grows there again.

MR. SAVAGE: No, Your Honor, we haven't -- there's -- due to the fact -- and we're not going to say this. As the Court's noted from both the government's brief and the defense's opposition, there is nothing left to salt. Pretty much the Boggs family dynasty and the Boggs family trust has moved all the operable assets out of this corporation and placed them into a separate trust known as Lynches River. And we -- they did it legally. We're not arguing that they did it illegally. But basically there is no forfeiture.

THE COURT: How many assets did they move out of there?

MR. SAVAGE: Pardon me?

THE COURT: Tell me what the total assets they moved out were.

MR. SAVAGE: We have some idea, not totally. Some idea of that. And I could show the Court.

First of all, I know that Mr. Bell's firm filed a motion and in pretty strong terms claimed that the government, I think, falsified, lied, deliberately manipulated things. And for that I take -- if there are mistakes in that, Your Honor, I take responsibility. Ms. Sugar faced by this phalanx of lawyers from these multiple high dollar firms with lots of lawyers needed a little help and all she could get was me.

So I remember attending a --

THE COURT: Probably some of the empire's assets have been bled clean by some of the attorneys on the other side.

MR. SAVAGE: Well, we're hoping some is left.

And what I want to do is show the Court what's been marked as Government's Exhibit 400. When I began this case, and this was after the indictment, I remember attending a few hearings. In that time the corporation was represented by Roy Black of Miami fame. And at that time we were arguing over different things. Really, what it was was -- and there was a letter that Mr. Bell attached to his motion that showed that if you do anything to Boggs Paving, Inc., you kill the entire Boggs network because as Exhibit 400 shows, while the company was operating this fraud, it was Boggs Group. It was very integrated.

It had a Boggs Transport thing that kept its trucks in one area. And according to Mr. Hicks' debrief, that was to limit its liability in case its truck ran over somebody.

It had another thing called materials or whatever. It had like the quarries and the -- it owned various interests.

And then it had Boggs Paving, Inc., which did the paving, and it basically did business with itself with these other entities.

Now, in fairness, and I'm not going to tell -- I apologize to Mr. Bell for whatever confusion there was. It wasn't just Boggs Paving, Inc. It should have said and my brief should have said Boggs Group. But Boggs Paving, Inc., was surely an integral part of Boggs Paving Group and without it it became -- there was a huge hole. So we became a little confused with that.

And if we look at some of the things that are here, the parent company Boggs Group contains various things, including Buckhorn Materials which is River Quarry, Construction Materials Group, Buck -- Black Creek Sand Mine, and affiliates of different Boggs Groups things.

So they were all at one time a large part of -- somehow integrated or owned by the Boggs family or the Boggs Group or Boggs Paving or Boggs dynasty in one way or another.

Then, Your Honor, we received various presentations. This one is what I've marked as Government's Exhibit 401. This is the Boggs Paving consolidated financials for 2012. We got these from the defendants. And I would note that it's Boggs Paving and Affiliates Consolidated Financial Statements.

Another part of my confusion in this was that when Boggs Paving was doing business, it filed one set of financial statements because they were all interrelated. And indeed, some of the various things that were complained about in the government's brief are, for instance, all of these corporations had a revolving line of credit with Caterpillar. They were all cross-collateralized and owed to one another in one way or another. And the deal was that if you kill one of them, you kill all of them, and we couldn't possibly have moved forward with that without jeopardizing jobs and the company itself.

One of the big things that it had going for it, though, was the Monroe bypass. Monroe bypass was a 300 million -- and it still is -- a $300 million construction project of which Boggs Paving, Inc., is one-third of a co-venture and stands to gain a hundred million dollars out of it to this day.

Now, one of the things I will take issue with the defense -- with the defense's brief on is this, is they're saying that no matter what happens here, that Boggs Paving has no interest, no money, no nothing. But one thing it does have is it still has that Boggs Paving -- that Monroe bypass contract.

And indeed, I was going to show the Court what we just received from the defense in a request for -- which is the Monroe bypass subcontract agreement for a hundred million dollars. And it's dated, if you'll note, Your Honor, October 25th, 2015. The State of North Carolina was required to issue this contract because it had originally contracted with Boggs Paving, Inc., well before it became disbarred and before it was indicted. And due to environmental litigation involving the Monroe bypass, the project was delayed for several years.

Now, one of the things is, is that this corporation might have -- there might be some limits on the ability of the corporation to hire people who are convicted felons or debarred, but the company still has the contract. Still has the contract to this day. Just awarded to it. And there's nothing the State of North Carolina can do about that because it was awarded before the debarment.

So going forward, Boggs Paving, Inc., I think, is going to be able to afford a measly $500,000 fine as a result of at least maybe a little cut of its hundred million dollar deal with the State of North Carolina for a contract that was begun while it was cheating but before it got caught.

And, Your Honor, the argument for a maximum fine -- and if I might show the Court one more exhibit. This is actually something I think the defense would show you as well.

And this is their diagram of how the company was split up afterwards. And if you look at it, at one point where Lynches River sits today -- and this is a company that's owned for the benefit of the Boggs family. In other words, they -- Mr. Boggs -- Mr. Drew Boggs, the defendant here, still owns Boggs Paving, Inc., still is in control of it. And indeed, we have documents that would show transferred assets, about $600,000 worth of assets from it to a company called -- if I can get it right. Make sure I've got that. One minute, Your Honor. I don't want to get it wrong.

Buffalo Creek Investments. And we received documents when we subpoenaed Buffalo Creek -- you'll notice in the defense reply that it says that certain high dollar equipment from, we allege, the assets of Mr. Boggs that caused some of the assets of Boggs Paving, Inc., to be transferred to Lynches River. And they said, Oh, that can't possibly be true. And he's right to one degree. What happened is

Mr. Boggs transferred the equipment to the Buffalo Creek Investments which sold it, and on the very same day leased it to Lynches River for a low profit.

So I think what they said is -- in any event, so there you go. So I think that at least that amount of money was transferred -- those assets were transferred. And even in its own assessment, it says that as soon as it gets done doing business, it's going to be out of business and then Lynches River is going to take over whatever Boggs Paving used to do. Of course, it's going to be doing business with Boggs Transport, Inc. And you heard Mr. Bell talk about its involvement. We didn't indict every single corporation, shame on us. But Boggs -- of course, Pork Chop worked for Boggs Transport, Inc., and directed the hauling in this case. Some of the hauling was done by the Boggs Material Corp. So none of these other corporations have clean hands, but they aren't indicted. They're still eligible to do business. And of course, Lynches River is there and it is what it is. It's a legal entity created. And according to the State of South Carolina, at least -- this was attached to us -- it is legally entitled to do business as an entity. And Your Honor has this as part of the government's pleadings.

I would note a couple of things in this report because, not surprisingly, once it became known that Lynches River was really made up of 90 percent of ownership of trust created by the Boggs family, we said, Well, what kind of punishment is that if they're allowed to do business simply under another name? And then there was a long investigation and they were found to be independently separate. And in fact, if you'll see -- and I want to make sure I'm clear on this -- that the company is run by Thad Preslar. Now, Thad Preslar was a former project manager for Boggs Paving, Inc. But the two corporations and the two trusts that run that are now obviously different people. And purportedly Mr. Boggs and his brother, who is not charged in this case but is disbarred because of his association with the paving company, have nothing to do with it.

But a couple of things about that, Your Honor. And I would note this because I think it's important to note that the assets of -- where the assets are going. And I think if we look at the paragraph that I have kind of outlined here -- and the State of South Carolina released the IG report.

Regardless of the strict legal -- legal interpretation of the debarment laws and regulations, a derivative effect or benefit under debarments is on the deterrent effect on wrongdoing in the South Carolina Department of Transportation procurements. For a road construction vendor, the risk of losing the right to conduct business with the South Carolina DOT on any project would likely be terminal for many companies, which clearly has a deterrent value. The complainants in this case that were competitors of Boggs Paving, Inc., and Lynches River who were competing for contracts complained that -- they certainly raised the issue of Boggs Paving, Inc., escaping the full consequences of the state's debarment regulations by establishing Lynches River to do business with the South Carolina Department of Transportation.

And they asked, and this is a good question, where is the deterrent value, or fairness, when a debarred wrongdoer apparently can materially use the same debarred company's assets and business operations in a new company or trust which continues to indirectly benefit the wrongdoer by channeling wealth to close family? And that's exactly what's happened here, Your Honor.

For those reasons we think that any wealth -- or the maximum extent to which the Court can fine Boggs Paving, which in this case is the $500,000 statutory maximum, should be the fine that's imposed in order to promote respect for the law and to be sure that the company is not simply -- does not simply benefit from its wrongdoing.

And I'd end with this note. When we were negotiating this case -- and I only bring this up because the defense in this case included a letter from the plea negotiations. It was noted that one of the things the company could have done or might have done is negotiate with its creditors because of the violation of its negative covenants. It can't break the law and still borrow money. It was having trouble raising cash. It was having a lot of trouble doing a lot of things because of the government's indictment.

But one of the things that it could have done with its money was to implement a compliance program. It could have been Boggs Paving instead of Lynches River standing here today. The Court could have imposed a probationary sentence. It could have imposed a special master. They were going to hire a clean -- quote, clean president to run the company the way it should be run. But instead what happened was, is -- unknown to the government, what happened was the company simply pled guilty. It would not agree to a plea agreement because there were two provisions in it. One, you can't hire felons and, two, you can't dissipate the company's assets. That being unacceptable, the company pled guilty without a plea agreement. The government accepted the fait accompli that it was and here we are.

So given all of that, Your Honor, we suggest that the maximum fine in this particular case, which should be like in the millions so that the company doesn't benefit by the fact that it's going to reap a hundred million dollars from the State of North Carolina. But the most this Court, I think, can do under its present ruling given there's the alternate fine which would be based on pecuniary gain or pecuniary loss is $500,000. So I think that after that, there's not a lot to argue about.

MR. GALYEAN: Well, obviously, Your Honor, we would disagree. Boggs Paving has been entirely consistent with the government from the very beginning of this process on what a detrimental impact the indictment or any proceedings even like it would have on Boggs Paving.

From the very beginning Boggs Paving has informed the government that any indictment or other action would lead to an immediate suspension of its ongoing bidding privileges with the South Carolina Department of Transportation and the North Carolina Department of Transportation.

We also indicated that that would mean that as a -- as an ongoing enterprise, that would be a severe threat to the continuing operations of Boggs Paving and also its affiliate enterprises.

I think, Your Honor, there have been a number of statements regarding the assets of Boggs Paving. I think the best thing to do is to tell you from -- for you to hear a witness by the name of Chad Warpula. He's the current trustee of Lynches River. He can give you detail by chapter and verse of how Boggs Transport and Boggs Materials were taken and molded into another company and how Chris Boggs and Drew Boggs have nothing to do with that company because of the structure thereof. And also how none of the assets from Boggs Paving have been dissipated in any way nor have they been sold to finance Lynches River.

So at this time, Your Honor, we would call Chad Warpula to the stand.

CHAD WARPULA, DEFENDANT BOGGS PAVING'S WITNESS, SWORN,

DIRECT EXAMINATION

BY MR. GALYEAN:

Q. Mr. Warpula, I apologize, I was mispronouncing your name.

A. That's all right.

Q. Could you tell the Court -- could you state your name for the record and tell the Court where you work.

A. Chad Warpula. I'm a partner at Troutman Sanders, a law firm here in town.

Q. What is your involvement with the current case regarding Lynches River?

A. I am corporate counsel for Lynches River Contracting, Boggs Materials, and Boggs Transport. I'm also a trustee of Lynches River Trust.

Q. And can you tell me how that relationship came to be.

A. Yes. When I found out that Boggs Paving and Drew Boggs had been debarred, my client at that time was Boggs Materials. And so I met with Chris Boggs and said we need to separate my client Boggs Materials from Drew Boggs and Boggs Paving because if they have any affiliation with them, then it taints Boggs Materials' ability to continue forward with its employees and assets.

From that point we discussed different operation options to separate Boggs Materials and Boggs Transport from Boggs Paving. As was explained before, they were part of a bigger group and my role was to separate materials and transport from Boggs Paving.

Q. And what steps did you take toward that end?

A. There were two trusts that were set up, two irrevocable grantor trusts that were established and Drew and Chris -- even though Chris wasn't indicted, I had Chris quarantined as well. And I said, I don't want materials or transport to have anything to do with either Drew or Chris or Boggs Paving. So we set up two separate trusts. They're grantor -- irrevocable grantor trusts which means Drew and Chris put the entities into those trusts and they can never get them out.

And from there the trusts are separate, independent legal entities; have separate, independent trustees to manage those entities going forward. And that effectively, from legal, tax, financial accounting, operational control purposes separates Boggs Materials and Boggs Transport from Drew Boggs, Chris Boggs, and Boggs Paving.

Q. You heard the government's statement earlier. Have any assets of Boggs Paving been used to finance or otherwise create an obligation between Boggs Paving and the Lynches River entities?

A.   No, and that's my role. As counsel to Boggs Materials, to Boggs Transport, and to Lynches River, I can't have a conflict of interest. If Drew Boggs, Chris Boggs or Boggs Paving has any direct affiliation or connection with any of my clients, then it taints them. And I ethically have sworn to keep that line clean and make sure there is no affiliation between the two. I'm not aware of any assets that have gone directly from Boggs Paving to Lynches River.
     I will speak to the Buffalo Creek transaction, if I can.
Q.   Please do.
A.   So Thad Preslar and Lee Sanders at Lynches River contacted me and said, We need assets. We're getting jobs. We need to pave roads. We need assets.
     And I said, You're not buying those from Boggs Paving. I don't want you to talk to Drew or Chris or Boggs Paving. I don't want you to negotiate. I'm not allowing you to have any direct connection with them.
     And they said, We've got a gentleman who owns Buffalo Creek Investments who may be able to help us. He's in the business of finding used equipment and he made -- he has relationships with people that have used equipment.
     So from there Chad Whitley, I believe is his name, he reached out to Boggs Paving as well as other vendors and found certain pieces of equipment. With respect to the equipment that was purchased from Boggs Paving, there was an appraisal

that was obtained. And I believe Chad would testify he paid more than the appraised value, what he thought it was worth for that equipment. And then he leased it or did a long-term lease under a note with Boggs -- with Lynches River to get them the equipment. He also did that with other vendors. He didn't only buy assets.

And the reason we had the appraisal is because we wanted to make sure that it was completely above board. And if you think about these assets, they're not being used on Boggs Paving's yard. They're getting dilapidated. They're rusting. If you don't use this equipment every day, it's going to break down. You won't be able to sell it except for pennies on the dollar. And so the best thing for Boggs Paving to do was to sell it, liquidate it, bring the cash in, which doesn't get dilapidated, it doesn't rust. It can sit in a bank account and be used to satisfy whatever it needs to.

Q. Did any of that cash from that sale that flowed to Boggs Paving, did any of that cash subsequently find its way to Lynches River's operations?

A. Not at all, no.

Q. What is the current status of Lynches River? What jobs are you operating on?

A. I'm not -- I don't have the list in front of me of the jobs, but I know they're actively engaged in North Carolina, South Carolina, and federally funded jobs. And at the time when we bid those jobs, North Carolina, South Carolina DOT, and USDOT looked heavily into Lynches River. They hired their own law firm. They had their own attorneys look at it. We delivered thousands of pages of documents as to the formation of the trust for Lynches River. They asked a number of questions. We met with them repeatedly.

And at the end of that, they determined there was no control by Drew or Chris. There was no financial impact. There was no oversight or involvement. That we had sufficiently quarantined Drew, Chris, and Boggs Paving so they've got no connection with Lynches River, Boggs Materials or Boggs Transport.

Q. Did those government entities that looked at this structure and the current status of it, did they request any changes to the structure or even make any requests of how Lynches River would operate in the future?

A. They did not. Richardson Plowden was the law firm for South Carolina DOT. And they said, It's our job to find how Drew, Chris, and Boggs Paving are somehow related. And at the end of the investigation, they said, We can't find any connection between the two at all. As hard as we tried to find it, we can't find any connection at all.

Q. Could you tell us who the beneficiaries of the trust of Lynches River are.

A. Sure. It's the children of Drew Boggs and the children of Chris Boggs. And as a beneficiary, I know they're family and they're related to Chris and Drew, but they have no ability to control the trusts whatsoever. It's kind of like being a beneficiary under a will. You sit there with your hands open and you get what's given to you. So even though it's family, they've got no ability to control.

And the element in South Carolina, North Carolina, and USDOT is whether a debarred person controls or has oversight. And in the structure that we've put together, which has been blessed by all the authorities, there's no control whatsoever.

And it's important to note that the assets of the trust can't go up. They can only go from the children down to their descendents. The assets cannot revert back to the donor. They can't go to their wives. They can't go to sisters, to parents, to siblings. They can only go from the children down to the future generations.

Q. Regarding the -- going back to the sale of the Boggs Paving equipment. Are you familiar with what happened with the proceeds of that sale?

A. Personally I'm not. I don't represent Boggs Paving.

Q. Okay. Were you directed to send payment in different installments to Black Creek?

A. There's an installment note where Lynches River is paid in installments, but I wasn't directed by -- that's the terms we negotiated with Buffalo Creek.

Q. And those were directly with Buffalo Creek.
A. That's correct. We didn't have any negotiations with Boggs Paving, Drew Boggs or Chris Boggs at all.
MR. GALYEAN: Nothing further, Your Honor.
THE COURT: Cross examination.
MR. SAVAGE: Yes.

CROSS EXAMINATION

BY MR. SAVAGE:
Q. You mentioned that there were no affiliations at all between Lynches River and Boggs Paving, Inc.; is that right?
A. That's correct.
Q. Have you reviewed the South Carolina Inspector General's Report on this issue?
A. I have.
Q. Okay. There were a number of coincidences that they found when they conducted their investigation even though they came out in your favor. And I'd point out if you could -- do you see the last line of the bullets there? Oops, hang on one second. There we go.
And this would be one of the last -- page 8 of the report. So facts giving pause to an understanding of the substance of Lynches River versus its form in distinguishing Lynches River from Boggs Paving, Inc., included, would you read that bullet.
A. "When interviewing the site supervisor for one of the

current Boggs projects with South Carolina DOT, he stated several crews had already moved over to LRC and another crew stated they would be 'switched over' to LRC soon."

Q. Okay. So obviously, there's communication between at least your principals at Lynches River and the people who used to be at Boggs Paving. There was a finding, at least in an interview by the IG, that they were moving the business over. Are they?

A. Lynches River has accepted as employees certain employees that had resigned from Boggs Paving. There has never been overlapping employment where someone is employed at Boggs Paving and Lynches River at the same time.

Q. Did Lynches River conduct any investigation before hiring those employees to find out whether they were involved in the DBE contracting fraud that was involved in this case?

A. Yes. At Lynches River we've been very strict. We're not going to hire anyone that's been involved in the DBE, anyone that's indicted, anyone that's been criminally charged. We have very strict protocol. And the employees that are in charge, Thad Preslar and Lee Sanders, have been very clear we do not want anything to do with Boggs Paving. We're a brand new company. We have new policies, new procedures. We do not want to continue the culture --

Q. Well, did Thad Preslar tell you whether or not he had been interviewed, say, by government agents in the case

involving Boggs Paving?
A. He had been interviewed, but he has not been charged to my knowledge.
Q. Well, did he tell you whether or not he knew of the DBE fraud involving Boggs Paving, Inc.?
A. He knew about it, thus his resolve not to continue it.
Q. Okay. Did he tell you whether or not he did anything about it while he knew about it as an employee of Boggs Paving?
A. He didn't -- that didn't come up.
Q. So you didn't ask him, like, what was your involvement? Did you run things through the DBE account at Boggs Paving? What was your involvement in that? You didn't go into any of that with him?
A. He was a gentleman in a truck and he drove up and down the highways making sure jobs were done. He was a project manager.
Q. Who appointed him as the 5 percent owner and president of Lynches River?
A. Both he and Lee Sanders bought in as a 5 percent owner of Lynches River, and that was myself and the other trustee Ingram Walters.
Q. And do you know where his 5 percent came from?
A. He borrowed the funds, and there's a promissory note where he borrowed those from Lynches River, which is standard.

When you buy in as an employee, you don't have to displace the cash immediately.
Q. Okay. And who loaned him the money to buy into the 5 percent?
A. Lynches River.
Q. Okay. So Lynches River, former employee of Boggs Paving Inc., along with Lee Sanders, they now own 10 percent, but Lynches River loaned them the money so they could own 10 percent and be the head of it.
A. That's very standard.
Q. That's what happened, right?
A. Correct.
Q. Okay. One of the other things on the top bullet that the the IG noted was, if you can read the top bullet there?
A. The phone number -- the highlighted part or the first bullet?
Q. Just the first bullet, I'm sorry.
A. "The phone number listed on LRC's prequalification application was registered to Boggs Transport, Inc."
Q. So have you changed the phone number yet? If you call Boggs Paving, do you answer Lynches Transport?
A. No. That says Boggs Transport, not Boggs Paving.
Q. Boggs Transport.
A. Boggs Transport, Boggs Materials, and Lynches River share the same office and the same phone number, as they can.

Q. And did they do that when they filed their joint financial statements with Boggs Group?
A. That was in 2012. We separated them in the beginning of 2015.
Q. Okay. So it would be accurate to say that before they were, quote, separated, it was one entity they operated together.
A. Materials produced rock, transport transported it, paving laid it down until we separated the entities, which I testified was my position to separate materials and transport from paving.
Q. And the beneficiary of this would be the family of the defendant in this case -- at least half of that would be the family of the defendant in this case Drew Boggs.
A. Not the family. The linear descendents, the children.
Q. Well, that would include people in his family, would it not?
A. It includes -- but his family also includes his wife and his parents and his siblings, which it does not.
Q. His children.
A. His children only.
Q. Okay. And does he still live with his children?
A. He does.
Q. Okay.
A. But the children can't control the trust.

Q. I understand. Now, you mentioned that the Boggs Paving, Inc., equipment was just simply rotting away somewhere. How do you know that?
A. I know that from Thad Preslar who said, We need to identify a couple of pavers. And before I left Boggs Paving, these pavers were out in the back yard not being used.
Q. And who currently is running Boggs Paving, if you know?
A. No idea.
Q. Pardon me?
A. I have no idea.
Q. Well, you were just in the courtroom today when Mr. Drew Boggs stood up as its chief executive and acknowledged that it pled guilty.
A. Other than Friday, today is my first day having involvement with this case. Boggs Paving and Drew Boggs are not my clients.
Q. Did Boggs Materials have any interest in an entity by the name of Buckhorn?
A. It did.
Q. What was its interest?
A. I believe it owned 50 percent together with a joint venture partner named A Mining Group.
Q. Did it also -- are you also familiar with a company called Construction Materials Group, LLC?
A. Yes.

Q. What is that?
A. I believe that owned the Black Creek Sand Mine.
Q. Okay. And you're familiar with the fact that they merged together on the -- that Buckhorn and Construction Materials Group were merged into one company?
A. What's the date of that merger? I can't see.
Q. Well, let me show you the second page. I was hoping you would ask that.
Can you read that?
A. Yes.
Q. What is the date of that?
A. June 9th, 2014.
Q. Okay. Is that about the same date that Construction Materials sold its interest in the sand mine to another conglomerate named Summit?
A. I believe Summit bought Buckhorn and CMG and merged them the same day. We did not merge the entities.
Q. And the assets from that transaction, did that go to pay the bills and -- any of the bills or expenses of Boggs Group in any way?
A. I have no idea.
Q. Okay. Did you know that $600,000 of it went into the Boggs family home, which is -- we've marked as Government's Exhibit 16?
A. No.

Q. Directly into the defendant's checking account and in to pay off his mortgage.
A. No.
Q. Would that be money that could have been used by the trust?
A. That was well before the trusts were formed.
Q. Okay. That would have been money -- you were part of Boggs Materials, money that could have been used by Boggs Materials.
A. It could have been.
Q. Okay.
A. It's not uncommon for an LLC to distribute money to its owners.
Q. Okay. You're right, there is nothing illegal about that.
A. Right.
Q. Now, who paid the -- sounds like a lot of work went into creating these trusts. Who paid the fees for the -- your law firm in creating these trusts?
A. Boggs Materials.
Q. Okay. And at the time who was in charge of Boggs Materials and who directed that the payment be made?
A. Chuck Steele assumed management and became the president of Boggs Materials.
Q. Okay.
A. He approved all our invoices.

Q. Now, are you familiar at all with the joint financial statements of Boggs Group before it was separated?
A. I'm not other than the fact you mentioned it.
Q. Would you be surprise to know it paid some $3 million in legal fees in 2012?
A. That was before my time.
MR. SAVAGE: Okay. No further questions, Your Honor.
THE COURT: Any redirect?
MR. GALYEAN: No, Your Honor.
THE COURT: All right. Thank you. You may come down.
THE WITNESS: Thank you.
(Witness stepped down.)
THE COURT: Further evidence?
MR. GALYEAN: No further evidence, Your Honor.
THE COURT: Okay. Any further evidence from the government?
MR. SAVAGE: No, Your Honor.
THE COURT: Any further argument from the government on sentencing?
MR. SAVAGE: No, Your Honor.
MR. GALYEAN: Your Honor, can I have one moment, please?
THE COURT: Yes.

MR. GALYEAN: Thank you.

(Counsel for the defendant conferred.)

MR. GALYEAN: Your Honor, just two brief further points regarding the argument.

There was much made a moment ago of the sale of the sand mine and the proceeds that went from that to Mr. Boggs' home. That has nothing to do with Boggs Paving. Boggs Paving didn't have an interest in that sand mine. Therefore, Mr. Bell is going to cover that in just a few minutes.

Mr. Orso can speak to the current status of Boggs Paving --

THE COURT: Who is Ken Lucas? Ken Lucas castle. Who is Ken Lucas? I know Ken Bell. I don't know Ken Lucas.

MR. SAVAGE: Used to be a Carolina Panther, Your Honor.

THE COURT: Used to be what?

MR. SAVAGE: Carolina Panther. No longer.

THE COURT: And that home was sold to the Boggs.

MR. SAVAGE: Yes.

THE COURT: I just wondered why it said Ken Lucas on there.

MR. GALYEAN: Your Honor, Mr. Orso can speak to the current status of Boggs Paving regarding the Monroe bypass job. There are additional facts that the government may not be aware of. I'll turn it over to Mr. Orso.

THE COURT: Okay.

MR. ORSO: Thanks, Your Honor. I know Mr. Bell has done most of the talking, but this is something that I know more than he does about for once.

So as far as the hundred million dollar subcontract on the Monroe bypass that the government keeps speaking of to Boggs Paving which was signed in October, that was a contract that the state needed to be signed urgently because of some emergency detour work that needed to be done. There was no contractor that was able to --

THE COURT: I don't think they're alleging there was anything wrong about signing that. I think they're just alleging there's an asset there that can be --

MR. ORSO: Okay. I'm getting to that.

THE COURT: -- used. I don't think they're saying there's anything wrong with that.

MR. ORSO: Pursuant to the supplemental agreement, Supplemental Agreement 39 on the Monroe bypass, Boggs Paving cannot going forward have a role in that or work on that project. So what Boggs Paving can do and is planning to do in the next couple of weeks is a little bit of that detour work before that entire subcontract gets assigned to another contractor that's not affiliated with or related to Boggs Paving.

THE COURT: Well, they signed a contract. Don't they owe you some money or allow you to sell the contract?

MR. ORSO: Boggs Paving may get up to about a hundred or two hundred thousand dollars for the detour work but nothing more on that contract.

MR. SAVAGE: There you go.

THE COURT: What about the -- what about the contract itself? They signed a hundred million dollar contract. Are you going to -- are you going to sell the contract?

MR. ORSO: Not sell it, just assign it under the terms of the supplemental agreement. They don't have an interest in those further funds. They're not able to work on the project or to gain anything further from it.

MR. GALYEAN: Your Honor, that's all Boggs Paving has.

THE COURT: Mr. Savage, anything else about assets?

MR. SAVAGE: No, Your Honor. Apparently they have money from the sale of equipment they sold in May. They have apparently a couple hundred thousand coming from the little hundred million dollar contract that they have. So clearly there is at least a half million dollars there that can be used to pay the fine in this case. And I think that would be a deterrent. And it's not salting the earth. This is a legitimate, I think, reasonable fine given the circumstances.

MR. GALYEAN: Your Honor, just briefly regarding that. The sale of that equipment did take place. However, that equipment was guaranteed by a company called Caterpillar Financial. The majority of the proceeds of that sale went to Caterpillar.

THE COURT: I'm sure -- I read a letter somebody loaned them 15 million at some point.

MR. GALYEAN: That's correct, Your Honor. And that is -- that is a good example of what happened with the entire company as we made the government aware very early on in the process. The majority of the equipment was heavily leveraged, as was the asphalt plants and everything else. The problem with stopping the flow of jobs to the company resulted in most of the equipment and asphalt plants and all the other major assets of the company having to be liquidated. As the jobs they had already obligated to complete, as those jobs were completed, the company began selling off assets, then had to lay off employees, and is gradually winding down its operations. There's not been any money that's flowed into these other companies. It's not dissipating its assets. It's paying its creditors. Indeed, at the end of the day, both Mr. Drew Boggs and Chris Boggs will have to come out of pocket a substantial amount of money to complete the projects such that the surety would not be able to come back against them because they are personally liable to the surety.

THE COURT: And I'll listen to all that with regard to Mr. Boggs when the time comes with regard to his fine.

MR. GALYEAN: Okay. Thank you, Your Honor.

MR. SAVAGE: Nothing further, Your Honor.

THE COURT: All right. Well, I do think that just as the -- just as with all of these others, that the dollar amount, the way that the dollar plays out in this and the fact that the government -- since there was absolutely no loss for the government and because of the way the guidelines played, that a defendant gets credit for the costs of doing things, that the result is that the -- this fine level under represents the harm in this case. And therefore, the Court will vary upward -- is it four levels, Mr. Savage?

MR. SAVAGE: Your Honor, I believe it was 18 -- it was -- we're asking that the Court go to base fine level 18.

MR. BAKER: It was a seven level --

THE COURT: Seven levels. Okay. The Court will vary up seven levels to base fine level 18 using the 1.4 multiplier and will impose a fine of $500,000 on Boggs Paving.

MR. SAVAGE: That might be slightly more than 1.4. I think, Your Honor, you'd have to go to 1.5. Otherwise, you would leave $10,000 on the table.

THE COURT: 1.4 times 350. Got to do more of this math than I wanted to do. I should have gone to medical school if I had to do this much math.

MR. BAKER: Times 1.4 will be 490,000.

THE COURT: Okay. Well, the Court will do 1.5 and impose the maximum fine of $500,000 in this case. The Court believes under all the 3553 factors that is appropriate in that the resulting harm is far greater than what happens when the loss is as low as this loss was under the guidelines as the Court interprets them. And I think clearly that's what they are. If I had reasonably been able to find another way, I can tell you I would have. I think that's the correct way to do it. I think the defense was right on this one.

All right. Anything else with regard to the company other than I'm assuming the company can appeal this sentence to the Fourth Circuit Court of Appeals. Any appeal must be done within 14 days and must be done in writing. If the company cannot afford an attorney --

MR. SAVAGE: And, Your Honor, just to be sure that the record is clear for the Fourth Circuit should it come up because there is no plea agreement in this case, the Court did consider probation in this case and found that it would not be a worthwhile exercise.

THE COURT: How in the world -- you can't send them to prison. You can't --

MR. SAVAGE: Well, you could impose a special master or --

THE COURT: Oh, Lord. Yeah, it's not -- no.

MR. SAVAGE: And the Court also found, just for the record, that restitution or remediation was not a factor in this case.

THE COURT: No, the government is not asking for restitution.

MR. SAVAGE: That's correct, Your Honor.

THE COURT: There is no restitution.

MR. SAVAGE: I'm just asking the Court to make the finding.

THE COURT: That's correct. Fine is the only way --

MR. SAVAGE: Thank you, Your Honor.

THE COURT: -- to punish the corporation in this case and the Court has done that.

MR. SAVAGE: Thank you.

THE COURT: Okay. You may appeal to the Fourth Circuit Court of Appeals. Any appeal must be done within 14 days and must be done in writing. If you cannot afford to appeal, you may appeal at government expense. I would suggest that you speak with counsel about whether or not you wish to appeal this case.

Mr. Boggs, do you understand your right to appeal on behalf of the corporation?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: All right. Thank you. This matter is concluded.

THE CLERK: Remaining counts.

THE COURT: Are the remaining counts against the corporation being dismissed?

MS. SUGAR: I believe we already dismissed them. Because they just pled straight up to count one, it remained on the Court's docket until we moved to dismiss them some time ago. But if that is incorrect, then I would move to dismiss them out of an abundance of caution.

THE COURT: All right. If they are not dismissed, let them be dismissed.

THE CLERK: Thank you.

THE COURT: Okay.

(End of proceedings at 4:00 p.m.)

THE COURT: All right. United States versus Carl Andrew Boggs, III.

Is defendant ready?

MR. BELL: Yes, Your Honor.

THE COURT: Is the government ready?

MS. SUGAR: Yes, Your Honor.

THE COURT: All right. Mr. Boggs, do you recall appearing before a United States magistrate judge for the purpose of entering a plea of guilty in this case?

DEFENDANT BOGGS: Yes, sir.

THE COURT: Do you remember being placed under oath at that time?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Do you remember answering the questions of the judge?
DEFENDANT BOGGS: Yes, Your Honor.
THE COURT: Do you remember signing a plea transcript form indicating your answers were true and correct at the time they were given?
DEFENDANT BOGGS: Yes, Your Honor.
THE COURT: Did you tell the judge the truth that day?
DEFENDANT BOGGS: Yes, Your Honor.
THE COURT: If I were to ask you the same questions today, would your answers be the same?
DEFENDANT BOGGS: Yes, Your Honor.
THE COURT: Mr. Bell, do you believe your client understood fully the questions the magistrate judge asked at the Rule 11 hearing?
MR. BELL: I do.
THE COURT: Thank you.
Mr. Boggs, did you answer the questions the way you did and are you going forward with your guilty plea today because you did commit the crime you're pleading guilty to?
DEFENDANT BOGGS: Yes, Your Honor.
THE COURT: Thank you. Then based upon those representations and the answers given by the defendant at the Rule 11 hearing before the magistrate judge, the Court affirms

the judge's finding that the defendant's plea was knowingly and voluntarily made. The Court also affirms the judge's finding that the defendant understood the charges, the potential penalties and the consequences of his plea. Accordingly, the Court affirms the magistrate judge's acceptance of the defendant's plea of guilty at the Rule 11 hearing and now and herein accepts same.

Ms. Sugar, would the government have a factual basis?

MS. SUGAR: I'm sorry, Your Honor?

THE COURT: Would you have a factual basis? I know Mr. Savage was distracting you.

MS. SUGAR: I'm sorry, Your Honor. The parties would stipulate to the factual basis as set forth in the filed factual basis and as set forth in the presentence report.

THE COURT: All right. Mr. Bell?

MR. BELL: We agree.

THE COURT: All right. Based upon that stipulation and the offense conduct as set forth in the presentence report, the defendant's plea of guilty before the magistrate judge, and the defendant's admissions in open court today, the Court finds there is a factual basis for the entry of the plea of guilty and enters a verdict and judgment of guilty in this case.

Now, Mr. Boggs, your case was referred to the United

States Probation Office for a presentence investigation and the preparation of a presentence report. The Court has now received that report. Have you read that report?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Have you gone over that report with your attorney?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Do you now believe you understand the contents of that report?

DEFENDANT BOGGS: I do, Your Honor.

THE COURT: Okay. Counsel, have one of you gone over the presentence report with Mr. Boggs and do you believe he understands the contents of that report?

MR. BELL: We have and we do.

THE COURT: Okay. Thank you.

Are there any objections to the presentence report which are still outstanding at this moment?

MR. BELL: No, Your Honor.

THE COURT: From the government?

MS. SUGAR: No, Your Honor.

THE COURT: Okay. Other than, I understand, the loss issue that the government objects to.

Okay. Then the Court will adopt the information contained in the presentence report for the purpose of applying the guidelines with the exception of the loss amount which the Court has found different than in the presentence report.

Where are we with regard to Mr. Boggs now? Ross, is he a 14 or a 13?

MR. BAKER: He's a 13, Your Honor, after acceptance.

THE COURT: Okay. After acceptance of responsibility, the Court believes that the total offense level would be 13, criminal history category would be I, and the guideline sentencing range in this case would be 12 to 18 months.

Does the defense agree that that is the sentencing range, the guideline sentencing range?

MR. BELL: We do, Your Honor.

THE COURT: Does the government agree?

MS. SUGAR: Yes, Your Honor.

THE COURT: All right. I'll hear from the government on punishment.

MS. SUGAR: Thank you, Your Honor.

Your Honor, the DBE fraud program has been talked about a lot, but it's a program that's supposed to let the little guy, the person who doesn't have as much of an opportunity to get big government contracts in the door. To take a small business, the American dream, raise it up. Get them to be a part of the economy. To not have monopolies where just the big guy, just the Walmart gets it and the mom and pops can't compete. That's what the DBE program is about.

So it's very interesting that here the defendant Drew Boggs is someone who got a construction business from his father and has passed on through this dynasty trust the same assets to his children, while Mr. Styx Cuthbertson is in the same place he was at the beginning. And that's really disturbing. And I think that that's really important for the Court to consider in fashioning a sentence in light of the 3553(a) factors.

Now, certainly this is a white collar crime. As I said earlier today, they didn't walk in every day and say, Let's commit DBE fraud all day long. It was just part of what they did, like in an accounting fraud case, like in a tax fraud case, like in an environmental fraud case. But it was an important part of what happened.

And we don't give white collar criminals a pass just because most of what they do is sit behind a desk. We don't want to continue the perception that the justice system favors those with money, those with education, those with good families. We have to treat white collar criminals and consider their crime serious and give them punishments that are not slap on the wrists, that are not just a pass, saying, oh, it's just a desk thing.

This is a serious crime that involves lying over years, lying in bids, lying in DBE reports, money laundering

$7 million. This was a complex scheme that involved nearly every part of Boggs Paving from the project management to the finance to the trucking. Everyone was involved to make it work.

And I'm just going to put back up on the screen Government's Exhibit 405. We've heard this defendant refer to this as this is just the left hand not knowing what the right hand is doing. And I submit to you, Your Honor, this is exactly what that's not. This is the left hand knowing exactly what the right hand and the left foot and the right foot are doing to make the numbers match and to make this work.

Year after year after year, despite being told by North Carolina DOT you can't do it like this; despite being told by South Carolina DOT you can't do it like this; moving him to plant hauler so he would be less easy to see; putting magnets on trucks so the people looking at the trucks wouldn't know whose trucks they were; getting a subpoena, a federal grand jury subpoena, and then bidding on a small business job in Styx's name where every dime of that money went to Boggs Paving and its affiliates.

This is not a regulatory offense, Your Honor. $7 million in money laundering is not a regulatory offense. This is conduct that took -- we know that that DBE bank account had three different CFOs listed on it. This lasted a long time.

Now, we also need to think about who's harmed and the DBE program is certainly harmed and that's the government victim in this case. But that's not the only harm here. We've heard from legitimate DBE's during this case who talk about how hard it was to get jobs because of things like this.

We've -- we know that there are other people who are trying to play by the rules who can't get jobs because of cheating. And we can't let that continue. Construction companies around North Carolina and South Carolina, they need to hear loud and clear that the U.S. Attorney's Office takes this conduct seriously. We will investigate and we will prosecute these matters and you will not walk away with a slap on the wrist.

A lot of the defense filing in this case talks about collateral consequences. Boggs Paving has ended. Well, they still have a $107 million contract. And the assets of the related companies have been sold for a trust for the children. Mr. Boggs is not having any financial difficulties, I assure you.

And the real consequences that I think we should talk about are what about these five other people who now have felony charges. What about everyone in this company who is now marred by this conduct that was led by the defendant Drew Boggs. Those are real -- those are real collateral consequences that I think this Court needs to think about.

And I'm disturbed by the defendant blaming others. If my supervisor took -- said, Oh, this ten years of contact that involved -- conduct that involved everyone at my company, but I didn't know about it, it was all Greg Tucker, it was all Arnold Mann, she would be laughed at because it's offensive. To blame the underlings is just not -- it's just not showing much acceptance of responsibility. And it's certainly not showing accountability.

And accountability is what this Court can do now. Hold Drew Boggs accountable. Consider the seriousness of the offense, respect for the law, and the need to deter others.

We would ask for the six-level upward departure that we've asked for in the other cases which would result in a level 19 and we believe that the high end sentence of 37 months is appropriate.

We also were concerned about the fine range in this case. We were very limited in what to do to the company because of the statutory max. We have a lot more room with Drew Boggs and that's because he's pled guilty to money laundering. So the Court could vary up as high as twice the laundered funds, and we would ask that you do that. We think that varying upward to a point where a fine equivalent to the $3.7 million that was supposed to go to a legitimate DBE, that was reported as having gone to Styx but mostly went into the pockets of Boggs Paving, that that would be the appropriate fine.

Mr. Savage showed you the joint financial statements. And you simply can't say Boggs Transport and Boggs Materials are separate. Those are still entities that the defendant benefits from, benefited from money of, and that had joint financial statements. We think that you have an opportunity here to vary upward on the fine to send a message that not only is jail time appropriate, but a substantial fine should be imposed to reflect the seriousness of DBE fraud.

THE COURT: Do you agree with his financial statement from the probation office? Have you looked at that?

MS. SUGAR: Well, there was also an amendment submitted. I do know that Mr. Boggs has plenty of money. I know that just three months ago he transferred a hundred thousand dollars from one of the entities that's listed in -- listed as one of his assets to a casino to gamble.

I'll mark this as Exhibit 21. This is a transfer from KLJ Properties by Drew Boggs to Tribal Harrah's Casino just in August of a hundred thousand dollars to gamble. So I don't believe this is someone who has a financial -- who's financially hurting. And this is someone who just paid $600,000 off towards his mortgage. I think he has a substantial ability to pay.

We have not thoroughly investigated his finances to tell you every dime he has, but we don't -- we don't think passing along all of your assets to your children and then claiming it's an irrevocable trust should be a way to hide from your obligations in this case.

THE COURT: Yeah. Mr. Bell, one question I have on the assets. It shows a liability to Boggs Material for 3 million, but there's no -- there's no asset that goes with that. What's that about?

MR. BELL: I'll have to take a look at that, Your Honor. I'm not prepared right at this second to address that.

THE COURT: Okay. At some point I'd like to know how they wound up owing Boggs Material 3 million without anything corresponding to what they got for that.

MS. SUGAR: Your Honor, we would note that the Boggs Material and Boggs Transport are 3.5 million right there in liabilities.

THE COURT: Right.

MS. SUGAR: Should be assets.

THE COURT: Well, there's a Boggs -- there's Boggs -- let's see. Is there a Boggs Transport over here?

MR. BELL: We'll take a look at that while --

THE COURT: Yeah, I'm trying to figure out what the real financial picture of the defendant is in fashioning an appropriate fine.

MR. BELL: I understand, Your Honor.

THE COURT: Not an anticipatory one, but an appropriate fine.

MR. BELL: Your Honor, I'd like to start by introducing Drew's family who is here beginning with his wife and two daughters, age 16 and 13, his father-in-law, and his brother Chris, who is extremely affected by all of this as well.

Your Honor, I keep having to talk about facts that are brought up for the first time that aren't facts and wouldn't have been presented to the Court if they'd just made a phone call to me and asked about what's bothering them.

Like just that last comment about, Well, he has a hundred thousand dollars that he can go out and gamble with. There is a family real estate trust that Mr. Boggs owns about 10 percent of that made a loan to some friend of the family to go gamble. It wasn't even his decision. Wasn't even his money. Now, a phone call to me could have made that a little more clear.

MS. SUGAR: Your Honor, Mr. -- Mr. Boggs' ID was also in the materials provided by the casino. That does not ring true to me at all.

THE COURT: It's not -- the main thing I'm trying to find out is not what he's got -- not what he's blown at the casino, but what he has in assets now. That's what my questions are. What are his -- in trying to fashion whatever the fine is going to be, I need -- I'd like as close to a real financial picture as I can get.

MR. BELL: He and his brother Chris --

THE COURT: I don't mind -- I mean, he can use his money for whatever he wants to.

MR. BELL: But he wasn't. That's my point.

THE COURT: I understand. But I'm just saying that one was not creating any issue with me.

MR. BELL: All right.

THE COURT: I look at the total asset sheet because there's a lot more people -- a lot more people to be dealt with there than just him. He has family and that sort of thing and, you know -- but he does have -- it is passing through other generations. It's always good to have a daddy or a granddaddy that makes money.

MR. BELL: Although in this case, Your Honor --

THE COURT: It's a lot easier to be born on third base than hit the triple.

MR. BELL: That's the other point I was going to make, that somehow this company, Boggs Paving, was given to Chris and Drew by his dad. That's not right. As we said in our sentencing memorandum, he and Chris went out and did this on their own. They bought their first asphalt plant. They hired their first crew. This was not born on third base stuff.

But what I want to address -- I keep getting afraid that we're losing the forest for the trees here in sort of a reverse way because the Court is exactly right that what -- its main job right now is deterrence and we have to fashion a sentence that will deter others from this conduct. And I keep coming back to, well, let's look at what this conduct was as opposed to just some of what's been talked about, about we really hurt a lot of DBEs who couldn't get ahead. This conduct in this case by this company and Mr. Boggs over the last ten years, not to the disadvantage of DBEs, not to the exclusion of DBEs, not in an effort to keep DBEs out of the economic stream and to better themselves -- and we put up this chart, this is Government's Exhibit 1 -- over these years has hired and paid something like 45 DBEs. So their history is not we're getting around DBEs. We don't want to use DBEs. We're going to play with DBEs. And some of these 45, and I can't give you a number, were hired when there was no government requirement to hire DBEs. They're just doing business with DBEs. So that's an attitude of the company as well. It's not some aversion to minorities or an aversion to hiring minorities.

THE COURT: No, and the Court doesn't think that. The Court thinks it was a fast and loose system that was convenient -- convenient to use someone to do the trucking and be able to control the cost of that. I mean, that's pretty clear that that's what was being done there. It was to control the cost of that aspect of it. Cuthbertson was reliable and apparently willing to work for less than some other DBEs might have been willing to work.

MR. BELL: Well, I dispute the latter part, but would agree with the first part, Your Honor. And even with respect to the 41 projects involved in this indictment, with respect to those projects, Boggs Paving paid DBEs more than they were required to under these programs.

So again, the program, the intended recipients were not harmed. I mean, they were overpaid, if you will. Which is fine. That's good. The government was absolutely entitled to a bid that was correct, to being told by reports here's who we're going to use. Here's who we have used. Here's who we paid and how much. They were absolutely entitled to that. But the program and, theoretically, DBEs were not harmed. I'll say it again. DBEs on these projects were paid more than the government required.

THE COURT: Right. DBEs that Boggs chose to do. In other words, if I was bidding -- if I was bidding -- if I was bidding and I had a DBE that I might use, put in my bid and I lost the bid, that DBE didn't get the job. DBEs may have gotten the job that Mr. Boggs was dealing with, but that DBE didn't. So the program -- the program is damaged.

I will agree with you no money was lost from the government. It appears that Boggs Paving did good work so there was not shoddy work done. This is not a Ponzi scheme. But it is a situation where the government has got to protect -- if Congress is going to tell us to do these DBE programs, then they've got to be protected. They need to be protected at this end. They also need to be protected at the end where they're being granted so that people -- the right people are getting the job and not somebody that knows somebody that tells them how to form a company the day they get the contract. That ought to not be the way.

MR. BELL: No, and that ought not be the case. That's not what happened.

THE COURT: I realize that didn't happen here. But I'm just saying there are a lot of things about a program that needs to be run right if it's going to be run. But it's got to be run right, Mr. Bell.

MR. BELL: Oh, no, Your Honor, if there is a crime --

THE COURT: And there have got to be penalties here.

MR. BELL: If there's a crime committed here, then the conduct that constitutes that crime needs to be deterred. And all I'm trying to do is come to some common understanding, if we can, about what the conduct is that needs to be deterred because the point Your Honor just made about, Well, they used the DBEs that they wanted to. That's the way this whole process works, the way the whole system is set up. The DOTs don't care which DBEs you use as long as it's a registered DBE.

THE COURT: But if you call them up, they'll recommend somebody.

MR. BELL: Well, they've got a list.

THE COURT: Right.

MR. BELL: Yeah, they've got a list of who you can use and get credit.

So within those boundaries they don't care whether you hire Styx Cuthbertson or somebody else. They really don't. And so that's my point of they should have reported and bid all these other DBEs that they actually used and actually paid. So they're not harming any theoretical DBEs. They did it wrong. Okay.

But even with respect to Mr. Cuthbertson, all these other DBEs, Your Honor -- another point I wanted to make. In this multi-year investigation, at least not that I've heard, there was no problem with Boggs Paving and its reporting of any other DBE. The problem is all with Mr. Cuthbertson. So it's not a systemic DBE fraud by Boggs Paving because they overpaid DBEs, and the only problem they seem to have had with any DBEs was Mr. Cuthbertson.

I'm not saying that this -- it's not bad and needs to be punished. I'm just saying this is not the evil -- root of all evil kind of crime that it's sometimes been made out to be. This is fairly -- although it was over a long period of time, it dealt with one out of 45 DBEs, during the course of which DBEs as a whole were paid more than the government was requiring being paid to them.

So I'm just trying to characterize the nature of the offense and the harm done before we talk about punishment because I think that the punishment, of course, has to be geared towards the harm done and that's my view of the harm done.

Now, as to punishment, and I think the Court made mention of this a couple times. You know, salt the earth, that seemed to be the appropriate punishment. And before we ever got here, punishment has been inflicted. And I think a great deal of deterrence has already been inflicted. Boggs Paving will soon be no more as we predicted when we were in plea negotiations. Once they were debarred because of the indictment, they cannot bid on any projects. If you can't bid, you can't work. You are entitled, and it's probably for the benefit of the state, it's not the companies. If you get debarred you can finish what you already have, which is all they've been doing for the last year or two, couple years I guess. And so those will wind up sometime next spring and those projects are over and they can't bid on any new ones. So that company is gone.

And while they've been winding these things down, Drew and his brother Chris, who didn't do a thing wrong in this case, 50 percent owners, they're in it together, and so they're going to pay the penalty here together, to a certain extent, large extent. They have already lost $12 million of winding this down and not getting any new work to keep things going. They will have to come out of pocket 50/50 individually another $3 million probably between now and sometime in the spring, maybe early summer next year to finish the projects they have. The reason they have to do that is if they don't go into their pockets and finish the projects, then the surety will come in and say, Well, then we're required under the surety bond to complete the project. We can hire whoever we want. We don't care what they cost to finish it, and come after Drew and Chris Boggs for whatever the difference is. So they have to continue to lose money to finish this just to keep from losing more money.

They have had to divest themselves of unrelated entities -- well, not unrelated. Legally unrelated because I don't want to be misleading about that at all. Boggs Material, Boggs Transport, these other companies, because Drew and Chris were -- well, because Drew was under indictment and has now pled guilty, he's debarred and so those companies can't do business with North Carolina, South Carolina, and federal funds.

Chris, who hadn't done anything wrong, owns 50 percent in those, he couldn't either. So it's not like he could buy Drew out and keep those companies running. He's just as harmed as Chris, which I know how Drew feels about that because -- pretty awful about that. So to keep those companies going in a way that could at least benefit their children, they -- and you heard from Mr. Warpula. Trusts were created, a new company was created so that the companies that are not charged in this case, Boggs Materials, Boggs Transport, they could put those assets -- sell those assets, actually, because there's a note, to these two trusts so that at least what they had built, but they are no longer allowed to work on, could continue to hopefully provide for their children and grandchildren.

And another main object of creating Lynches River was Drew particularly, I'm sure Chris as well, felt terrible about the fact that their 300-some employees are losing their jobs as they're winding down and eventually there will be no jobs. And so what they wanted to do was create an entity that would hopefully provide for their children and grandchildren, but give their former employees who hadn't done anything wrong a place to go and continue to work.

So if you want to talk about the punishment -- oh, and there's -- let's talk about salting the earth. So when Mr. Boggs, Drew Boggs, sells his one-third interest in an entity that was not under indictment, not a Boggs Group entity, and takes his share of those proceeds and puts it into his family home to pay off his mortgage, that too led to the government filing a notice of lien of forfeiture. And again, if they had made a phone call, that might not have been necessary because when we responded to that motion and laid out the facts, they withdrew it.

But there doesn't seem to be any punishment that's enough for the government in this case. Company out of business. Not enough. Chris Boggs losing 7-1/2 million dollars, not enough. Drew Boggs, 7-1/2 million dollars, not enough. Drew and Chris Boggs can't work in the profession that's been their whole life, that's not enough. Transferring the assets of companies they can no longer work in into trusts for their children, that is somehow nefarious and needs to be punished almost in and of itself for the suspicious nature of it.

So there is tremendous punishment here already. And more importantly for the Court's purposes, probably, tremendous deterrence. I don't think any general contractor out there who's followed this case and will read the newspaper tomorrow will say, well, here's what happened to the last guy that did DBE wrong. He lost his company. He lost millions of dollars. Has made his brother lose just as many millions of dollars. He's out of the profession essentially forever. And all he can do now is hope that these trusts that have been set up can take care of his children. Now, that's -- that will deter some people right there.

Now, I know that the Court is trying to sentence these defendants -- I've been watching the floor rise up under us as the Court has been doing sentences. I don't particularly object -- wouldn't matter if I did, of course, I understand that -- to any of the sentences that have been imposed.

You know, one of the things that bothered me a little bit -- I just have to say it again, although maybe it doesn't matter. For Greg Tucker to be able to come into this courtroom on Friday and commit perjury and then have the government laud his substantial assistance does bother me a little bit, but probation was his sentence and that's fine.

THE COURT: If I believed. I have no way of knowing in the limited information I have --

MR. BELL: I understand that.

THE COURT: -- beyond that to know whether what he said was true. I took it as being accurate and counted on the government to be the governor on that with regard to whether or not he did.

MR. BELL: I understand that, Your Honor. That's why I --

THE COURT: That's what I have to do. In other words, I understand you believe that he did, but I have no knowledge that that's accurate. And maybe he did, maybe he didn't. I don't distrust what you say.

MR. BELL: I know.

THE COURT: But I understand that bothers you. But that's...

MR. BELL: And, Your Honor, I want to talk about -- I hope this isn't taken the wrong way because I've tried to figure out how to phrase it so it expresses what I'm trying to say. Mr. Boggs, as he will tell you, bears the greatest responsibility for this because it was his company. I don't think he bears the greatest culpability for this. I don't think he knew as much about what was going on that was wrong about all of this as several others. In fact, when we were talking about Mr. Hicks, the former CFO, who was sentenced and received a sentence of probation, when he was interviewed after his plea, he was, of course, asked about all this and who knew what and what did he do about it. And one of the things he told the government at that time, when Hicks first started at Boggs Paving he was overwhelmed with the job and he did not know the DBE rules. As such, the run-through of funds involving Styx Cuthbertson Trucking did not immediately register with him. As time passed Hicks realized it was wrong. However, he never discussed the issue with Drew Boggs or tried to fix it.

Now, I'm not saying that Drew didn't know, should -- should have known and should have fixed this. There's no question about that. I think when he comes into these bid meetings and they're going through the thing and they don't know where else to put their DBE commitments, he says, Write Styx in, you ought not do that if you don't know Styx can perform the work. And I don't know that Mr. Boggs made any effort to make sure, as he should have as CEO, that Styx performed that work. I think he could have because he earned more money over this time than was committed, but he didn't do anything about it.

With respect to the DBE reporting, that side of it, because it wouldn't -- in some ways it wouldn't matter in that it could have been fixed if they had over committed Mr. Cuthbertson, right? We heard from the DBE director that, yes, there's a way to do it. You can come get permission to sub other drivers or other DBEs or even we can just let you go if your best faith efforts can't find somebody else to do it.

So the problem in this case wasn't really the bid process because that can be tracked, followed and fixed with substitutes if necessary.

The DBE reporting was done by this wholly wrong system where Kristy Lawrence is entering the numbers that go through these accounts from Boggs Paving to Styx Cuthbertson to Boggs Transport. And then poor Terry Coleman, who I'm sure was doing her best, and the two women who came before her going all the way back in the '90s, they prepared the reports the way they had always been done under no direction of Mr. Boggs or anybody else, but he was CEO. And he will tell you when I finish talking that was his job to make sure that was done right and it wasn't. There's responsibility, but not necessarily culpability.

And so I'm not trying to run away and he's really not going to try to run away from it either, but if you look at who did this collectively so that the court can put in -- Mr. Boggs in an appropriate sentence along with the others, he was really less involved in this than CFO Hicks because it was his job to keep up with the money. He was the one supervising Kristy Lawrence and, to a certain extent, Charity Coleman, although I think she might have been technically in another department. She was in accounting. There were a lot of people who could have caught this and fixed it. He's the boss, I get that.

And the Court wants to deter, but there is a heap of deterrence out there already and the Court does not need a -- well, my view, and I know I'm an advocate here, but I'll give you my view anyway. I don't think he needs a prison sentence. I know the Court is going to be informed by the 15 months it gave Mr. Miller. But when I look at this conduct, and trying to be not just an advocate, but dispassionate, this conduct --

the offense conduct and the harm to the DBE program and Mr. Boggs' role in it and all of the punishment and deterrence that's already been heaped up does not require a prison sentence.

I've got a sense of what the Court is going to do, but I just don't think that's what's necessary for punishment. And certainly not some huge jump up variance above what the guidelines are. You know, if Mr. Miller is at 15 months, okay. And perhaps it should be something close to that. But this sort of three years' worth, that is -- in my view, Your Honor, that would be a disproportionate, much harsher than necessary to accomplish any of the goals that the Court is trying to accomplish here.

THE COURT: All right. Thank you.

MR. BELL: Mr. Boggs, I think, would like to address Your Honor as well.

THE COURT: Yes, sir, Mr. Boggs.

DEFENDANT BOGGS: Your Honor, I had to make some notes because my memory is not all that great.

I realize what I did was wrong and I accept full responsibility for what happened at my company. I was the president. I should have -- I should have dug deeper. I should have done anything possible to stop it and I didn't, and I take full responsibility and accountability for that here today.

Styx Cuthbertson was a real business long before Boggs Paving ever incorporated. Mr. Cuthbertson ran his business. He worked hard. He kept his trucks running. He drove his trucks. He managed his affairs. And he's a good and honest man. And I feel horrible for what happened to him as a result of our misconduct and our failure to manage our affairs right. He's just -- he's a good man and I'm very truly sorry for him being a part of this.

From the very beginning, our intent was to help Mr. Cuthbertson. DBE -- NCDOT had a program called the DBE mentor protégé program and we had contemplated signing up for that program. That program enables the prime contractor to take a DBE contractor kind of under their wing and mentor them and help them cultivate and grow their business. And, you know, we had a problem at our company for just being hard chargers and playing offense probably too hard and not taking time to dot all the I's and cross all the T's.

And looking back, you know, we really should have gone and signed up for that program and followed all the rules and protocols and that program would have enabled us to help him like we did help him following those rules. But we failed to do that and we were wrong for not doing that. I take responsibility and accountability for that as well.

As far as the goals and commitments, it was absolutely our intent for him -- for us to meet the goals that we put in our bids. On a given bid night we might bid ten -- I remember one month we bid 22 jobs in one month. We did not know when we turned those bids in whether we would get 1 of those 22 or 19 of those 22. And so certainly it would be very fair to say that if we got 19 of them, we would have all been over committed and we would have been late on the jobs and had to pay legal daily damages, which happens sometimes. You know, so that would have put us at a huge over commitment on everybody's part. But on the other hand, we could have been unsuccessful and there have been months when we've gotten zero jobs. And so it really didn't matter at that point what you had written in a contract to perform because he wasn't going to get anything. So that's kind of the variants on bid night. You don't know what you're going to get so you really don't know if anybody is over committed or not.

Over time this issue just progressively became worse and obviously transpired into something that became, you know, bad and not following the rules and the regulations and I should have caught that. I'm the guy that should have dug in there and said, wait a minute, why are we reporting this or why is this checkbook in this building? And I didn't do that and I should have done it, and I take responsibility for that.

Just in general, you know, throughout this process of this investigation and all the different things we've gone through, you know, I've learned a lot about what's right and what's wrong. And again, one thing I've learned is it would pay one to spend more time working on defense, so to speak, learning how to dot your I's and cross your T's and doing things right in compliance and making sure that you are following all the rules and we just didn't do that. I didn't do it. I was president of the company. You know, I've learned that that's -- that's just as important as growing your business and going out and building work and, you know, I didn't do that. So I'm responsible for that.

As far as a deterrent, I do believe there's been a bunch of people watching. I've had calls from contractors all over the country who wanted to know about this case. And I think this situation, our case has definitely raised some eyebrows about how others in this industry as far as the western United States have changed the way they're doing business to try to make absolutely certain they're following every rule and every regulation and they've seen what's happened to our company, and I think that -- I think it will serve as a huge deterrent for future behavior like this. And I certainly hope it will.

You know, I've been very involved in the industry for many years and one thing I think I can do in the future to help deter is, you know, use my contacts and speak at our industry events and help other prime contractors learn what not to do and help DBEs learn what not to do and what to do and I hope I have the opportunity to do that in the future.

Other businesses, you know, other things I'm involved in has raised my awareness of looking at the rules and the regulations. And again, more on defense and less on offense and just trying to make sure we follow every rule and do everything right. And I've -- you know, I've learned a lot from this and I'm committed to doing that in the future.

Finally, I'm just sorry for all the folks we've hurt by our actions. You know, DBEs, the industry, these folks having to take their time. You know, it took an awful lot of resources and, you know, I'm truly sorry for all that everybody has been through, especially my family, my wife and my daughters, my mother, father-in-law, you know, just all my family and my friends, my 300 employees, many of whom were minorities, women, good employees. And then my brother Chris. You know, he's a hard working guy and he didn't do anything wrong. And as Mr. Bell said, he's been severely impacted by what I and the other defendants have done and I'm truly sorry for that.

And I -- that's all I have. I'm sorry to the Court.

THE COURT: What says the government about the -- any comment regarding the losses that the individuals are having to pay to finish the job?

MS. SUGAR: Well, I do want to point out that we -- as we've stated over and over again, and we have a completely different view of the facts, and we believe that the factual basis of the other defendants just completely go against what Mr. Boggs said. You see that the amount that was run through the Styx nominee account was substantially more than the amount that was paid to him and in the end he made what a truck driver would make.

THE COURT: I'm talking about on the loss -- on the impact on the defendant -- defendant's company and those kinds of things in terms of that. In other words, when you -- you know, you put somebody out of business -- I'm looking for a deterrent value.

MS. SUGAR: Sure, Your Honor.

THE COURT: I'm in a case with a zero loss, zero cash loss. Government lost no money. The jobs got done. They got done, I guess, on time. The problem was that the program that was set up to help disadvantaged business entities was ignored, I think just completely with regard to -- I mean, they may have done that. They may have overdone it. They may have tried to do it. But nobody was keeping track of what was being done and they violated all these rules and regulations.

So the question is in the deterrent value that -- I want to know as to what -- what with regard to the financial impact on the -- on Mr. Boggs and the companies. I can't get into what his brother suffered because he's not in front of me.

MS. SUGAR: Well, Your Honor, I do believe that most, if not all, of -- very good portion of the employees have gone on to work at Lynches River.

THE COURT: I'm not worried about the employees. He's talking about the millions of dollars that were lost because the companies had to close. I am aware if you close down the company, usually there's -- if you've got jobs going on, there are some things that are lost if you have to do it within a certain short period of time. If you do it in a long period of time, you can make money; but on a short period of time, you lose money.

MS. SUGAR: Well, Your Honor, there are -- in corporate prosecutions which have been in the news recently, there are a variety of different ways those can be handled. And in this case we saw DOT go to Mr. Boggs again and again and say these are wrong. So when a company is approached initially, there are other -- there are other ways to deal with it. But that's not what happened here. So for -- if the company would have gone along, complied, changed the program the first time it was made aware, we could be in a different situation. So it's Mr. Boggs' conduct that brought us where we are today.

THE COURT: I understand. I'm not blaming the government for bringing the prosecution. I have said the government was right. I'm trying to come up with an appropriate sentence for Mr. Boggs, is what I'm trying to come up with. I'm not blaming the government for doing anything wrong. And so -- and it's a serious matter. But I am impacted by the fact that no money was lost and the idea that I still thought that the numbers would be higher and wouldn't go as low as they did. That's why I'm varying up, and I'm going to vary up on Mr. Boggs.

But the main thing here is to make people do what these folks want them to do on these DBEs so that we can get this -- get the right -- you know, have the program run the way that Congress intends it to be run. It needs to be run that way on both ends.

In other words, if suddenly -- if suddenly someone who -- a female who's disadvantaged under the law had her own business and decided to start her own business and she was sitting in some big corporate office over here and she started her own business and came out as a disadvantaged business entity and was able to use her gender to get a job and then hire a bunch of folks on salary, that doesn't seem to me to be what they were trying to do.

Cuthbertson seems to me to be the kind of guy that ought to be the poster child of this and not somebody who comes in and uses a particular thing that Congress has said is worthwhile to use to get the job when they really aren't economically disadvantaged, they're just disadvantaged -- they fit the disadvantaged area of this. Either they're a minority, they're a woman, disabled, a service disabled veteran. And companies shouldn't be able to suddenly add a service disabled veteran and pay him for his disability and get the job too. I'm an owner. Well, what percentage are you going to get? They're paying me this much money to be an owner. That shouldn't be the way that it is, but -- on that end. On the other end they got to cross the T's and dot the I's or the program falls.

So I'm ready to sentence.

MS. SUGAR: Yes, Your Honor.

THE COURT: I'm going to sentence Mr. Boggs to an active sentence. The question I'm trying to find out is what's the appropriate active sentence that is going to in this case punish him for what he did and the fact that he is the head guy, it is his responsibility, and primarily deter others. I don't think that -- I don't think anybody who's been in here for this full day of sentencing is going to think these people are going to violate the law anymore. I got people -- I got people coming back and I can pick out the recidivists the moment they walk out of the courtroom now, the ones that I'll be saying in my mind, Be seeing you again, and the ones that I won't ever see again. And I don't think any of these people will ever be seen again. But there are people out there watching this case that must be deterred.

MS. SUGAR: Yes. And, Your Honor, certainly under 3553(a) you must consider the other consequences of this prosecution. We don't disagree with that at all. But I think when you compare those consequences as to someone in Mr. Boggs' shoes as opposed to a CFO who now has a money laundering conviction, other people who now have felony convictions and disbarments without this company and without this money to pass on to their family, they're hurt even more. And I think --

THE COURT: That's why he -- that's why he's going to jail. He's going to get the longest sentence of the people, but I've got to decide what that sentence is going to be.

(Government counsel conferred.)

THE COURT: I mean, you're looking for me to go up six, and that's fine for you to argue that. I'm trying to find out -- the reason I asked you the question is not for you to necessarily reargue. I understand you have a reasonable -- you're making a reasonable request at 19, 30 to 37 months, and you're asking me to go high end of the guideline. In trying to figure out whether that's the guideline point that I want to hit, my question to you is do you have anything that you can add to say that they're not accurate in saying about the millions of dollars that they have lost as a result of this in terms of another way of punishment? It's their own fault. But you -- but in terms of deterrence, a business person out there is going to look at it and say, you know, if I could save millions of dollars, I'd go to jail for a while rather than lose millions of dollars and go to jail for a while.

MS. SUGAR: Your Honor, I think the issues you've pointed out in the financial statements in the PSR go to that. The liabilities don't make sense. It looks like his net worth should be substantially higher than this because there should be some asset that matches Boggs Materials and Boggs Transport. So we're concerned that this is not an accurate reflection for the Court of his financial situation or the harm that's come to him.

And also, we don't know what is the value of these trusts that have gone to his children. If he's just moved millions of dollars and now is -- sure, he can't access it, but gone to his kids, then how does that really impact --

THE COURT: Yeah, the companies -- whatever that they haven't spent have been moved into those trusts and they're going to operate the same paving company to the advantage of the children. Now, they'll have to be -- I'm sure somebody will be watching the store on that, but my guess is that the assets -- that whatever assets they couldn't keep to keep the paving business going and all the other businesses going is in the trust. And if it's not illegal to do it, they get to do that. I can't --

MS. SUGAR: Yes, but I think we should consider it and what the loss to his personal finances is.

THE COURT: Yeah, I'm not going -- I'm not giving him credit for what he had to transfer -- or what he decided to do to the dynasty trust, which they call them dynasty trusts even if they're piddly little amounts of money. I mean, something has been done to get people to do trusts. It's a good marketing tool for the state lawyers. Mr. Bell can ask his people up there to do his estate stuff. I bet there are plenty of them up there. They call them dynasty trusts whether you're a little player or a big player because it makes the person feel really good about the fact that it's a dynasty.

MS. SUGAR: But if someone comes and says, Well, I gave away my stock in a company so now I have -- don't have assets, it's certainly something the Court should --

THE COURT: They sold it. He has a note back. He's going to get paid for that stuff over the years. I mean, you heard -- in other words, there's a note that went from the dynasty trust to them. He'll be getting money paid to him on the note for the value of what came. There will be money coming in. There will be income coming in, assuming it makes a profit.

MR. BELL: If the company is successful.

THE COURT: If the company makes a profit, he'll get paid. He'll get paid whatever the value -- I don't know what the note's worth. He'll get paid. But that's what the testimony was. Notes went back and forth to form the dynasty trust.

So I'm -- Mr. Bell, do you want to say something while they're talking?

MR. BELL: I did because the Court asked me when we first got started to plug in a couple of holes on the presentence report and the financials. I think you were asking about the liabilities on the final report that I have, page 15.

THE COURT: There's two large liabilities that don't have anything corresponding as to assets on the asset side.

MR. BELL: Those are liabilities to Cat Financial. That's where those liabilities come from.

THE COURT: Well, what are -- where are the assets of the companies themselves to Drew Boggs? In other words, there's -- in other words, there's -- on the asset side, it doesn't appear that there is any company called -- and maybe I just looked at the wrong thing -- called Transport. In other words, I understand the liability aspect of it. But on that -- I realize when we're trying to fill these things out, it's not like -- or maybe it is like a bank. They sure loan out a lot of money on financial statements.

But it looks like there's -- there's two loans in here, substantial loans to -- one to -- for Boggs Materials, Inc., and one Boggs Transport, Inc., but there's no company listed over here. There's Boggs Paving, Boggs Property, Boggs Farms, Boggs HMA, and then I guess BOVA Corporation, which maybe that's Boggs Virginia, I don't know. Boggs Brothers, Boggs Paving. But no Boggs Material or Boggs Transport on the asset side.

MR. BELL: I think I've got it figured out, Your Honor.

THE COURT: Okay.

MR. BELL: Those -- listed under liabilities, Boggs Material, Boggs Transport, those are debts owed by those entities to Caterpillar and they are personally guaranteed by Drew and Chris.

THE COURT: Okay.

MR. BELL: So those -- and they are Boggs Materials and Boggs Transport.

THE COURT: Does he have any stock in that company? Is there any ownership in the company as an asset over here?

MR. BELL: The stock in those companies -- we provided that information. I can't find it on this sheet that we provided. But now -- I mean, this is after the reorganization.

THE COURT: I understand.

MR. BELL: But, you know, those were -- the trusts now own Boggs Transport and Boggs Materials with these notes coming back, the value of those notes.

And one other thing I would point out to the Court, and this is our mistake. We caught it sort of late.

Under "Asset Type" it shows Principal Financial Group for $3 million. And that's a life insurance policy, and that makes it look like it's got that much cash value. It's actually a term life insurance policy with no cash value.

MR. BAKER: Your Honor, may I? In regards to the defense, they did provide me with information to supplement. I completed the supplement, but our office did not file it with the Court.

THE COURT: Okay.

MR. BAKER: I've got a copy here. I don't know that it dramatically changes what you're referencing in terms of Boggs Transport, but it's a little bit cleaner than the presentence report. I apologize for that.

MR. BELL: So I think -- I don't know what the newest numbers look like, Your Honor, but I think Mr. Boggs' net worth is under a million dollars.

THE COURT: His net worth is what?

MR. BELL: Under a million dollars.

THE COURT: Yeah, it has on here his net worth is minus 600 -- 6,822,000.

MR. BELL: I expect that's because Boggs Paving is bleeding and he and Chris have to keep putting money in it.

(Pause.)

THE COURT: Well, not an easy thing, but I've got to come up with an appropriate sentence in the circumstances of what we've got here. I've gone up six levels on the others; and then, of course, there was some reduction for some, but I did give Mr. Miller 15 months.

It's difficult for me to believe -- I do believe that Mr. Boggs may not have known all of the details of it, but he knew that this was -- these rules were there and that people were just plugging something in, and he's taken responsibility for it.

So if I go to the level the government is telling me -- asking me to go to, I would be at 30 to 37 months, which is half of what the government was asking for originally today. And the fine range would be 6,000 to 60,000 dollars, in that range there.

All right. The Court is going to vary -- the Court believes that -- as it has in all the cases today, that the dollar amount which the loss -- the dollar amount of loss in this case under -- under represents the harm that has happened in this case and damage done to the disadvantaged program, their business -- Disadvantaged Business Enterprise program, and that a variance is required in order to -- in taking all those things into consideration in order to get a sentence that's appropriate.

The Court has all this area in order to use the 3553 factors and will note for the record, having looked at everything, what the sentence is the Court has given and the sentence the Court will give in this case would be the same regardless of whether -- since the government had capped it at not more than five years regardless of what the loss was in this case. But it's made harder to get here because there was no loss in this case, and the fact that there is no loss in this case to the government.

The loss is to the Disadvantaged Business Enterprise program and that's a laudable thing for the government to do. The Court is not one to discourage the government from doing these kinds of things. There is nothing wrong with this prosecution occurring. Those decisions have to be made by the U.S. attorney and one U.S. attorney might make it and one U.S. attorney might not make it, but it is within their power to do that. And it's a -- it's an awesome power that they have and it's one that they regularly exercise well. People may disagree on individual cases as to whether they do or not, but they -- that's their call. They're the ones who are doing the prosecuting. The government just has to sentence -- I mean, the Court just has to sentence.

All right. I'm going to vary upward to a total offense level 19, criminal history category I, 30 to 37 months, and I will sentence at the low end of the guidelines.

So if you would stand up, please, Mr. Boggs.

This sentence is going to be the same sentence on each count.

Pursuant to the Sentencing Reform Act of 1984 and *U.S. v. Booker* -- and these are going to run concurrent -- it is the judgment of the Court, having considered the factors noted in 18, United States Code, Section 3553(a), that the defendant, Carl Andrew Boggs, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 30 months on each of counts one and twenty-one to be served concurrently.

The Court recommends that the Bureau of Prisons designate a facility near Monroe, North Carolina, for service of the sentence to facilitate visitation with family. However, this designation -- the defendant should be designated to the -- should not be moved close to Monroe, North Carolina, if such designation causes him to be placed at a higher designated prison than he otherwise would. In other words, if he would be fortunate to get a camp, he wouldn't want to be moved to near Monroe, North Carolina, to a prison. So to the facility nearest Monroe, North Carolina.

The Court further recommends that the defendant be allowed to participate in any educational and vocational opportunities while incarcerated.

Upon release from imprisonment, defendant shall be placed on supervised release for a term of two years. This consists of a term of two years on each of counts one and twenty-one, all such terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state or local crime.

He shall comply with the standard conditions that have been adopted by the Court in the Western District of North Carolina.

It is ordered that the defendant shall pay the United States a special assessment of $100.

MR. BAKER: Your Honor, actually, that would be 200.

THE COURT: $200, thank you. Special assessment of $200. This special assessment is due and payable immediately.

Mr. Bell, is there any problem with that being paid before he goes to the prison so I don't have to --

MR. BELL: No, Your Honor.

THE COURT: Okay. All right. Now, let me hear from you all on fine for a minute. I know the government would like the top end of the fine. Nothing wrong with that.

What does the defense say?

MR. BELL: There's already millions of dollars worth of fines, Your Honor. I mean, anything else is...

THE COURT: I need to put a fine on here.

MR. BELL: I understand that.

THE COURT: He can afford to pay one. But I do agree, sounds like financial -- financial punishment is not the greatest thing that needs to happen in this case. That's why -- that's why I think a prison sentence was the only -- the only thing left to the Court, and I know you disagree, Mr. Bell.

MR. BELL: No, no, I -- you know, low end of the guideline range serves the purpose of imposing a fine, Your Honor. But literally, I mean, it's already millions for him. His brother has paid millions in sort of quasi fines. That's enough money really, Your Honor.

THE COURT: All right. It is further ordered, having considered the factors noted in 18, United States Code, Section 3572(a) -- let me see that financial statement. Did you take that back? Let me take a look at that one more time.

(Document tendered to the Court.)

THE COURT: Thank you.

That's not that helpful.

Probably with this financial statement, I don't think -- assuming that that was what was done with the hundred thousand dollars, that was 10 percent, I don't know that I would loan money to somebody to go gamble at the casino. But I will -- okay.

Having considered the factors noted in 18, United States Code, Section 3572A, defendant shall pay the United States a fine of $15,000.

Defendant shall forfeit defendant's interest in any properties identified by the United States.

Anything else the government would request in the sentence?

MS. SUGAR: No, Your Honor.

THE COURT: Is there any legal reason why this should not be the sentence imposed in this case?

MR. BAKER: Your Honor, are you going to create a schedule for the payments?

THE COURT: On the fine?

MR. BAKER: On the fine.

THE COURT: Mr. Bell, is he going to be able to pay the fine or do I need to put the schedule on it?

MR. BELL: We'll get it paid, Your Honor.

THE COURT: All right. Then the fine needs to be done before he goes to prison. He's going to get to report on his own.

MR. BELL: Thank you.

THE COURT: I'll set a date -- I doubt they're going to set a date this early, but I'll set a date, if you want me to, beyond January 1.

MR. BELL: I was going to ask Your Honor. Thank you.

THE COURT: You might tell the -- Mr. Miller's lawyer --

MR. BELL: Mr. Fialko.

THE COURT: Yeah. If he requests that, I'll order that his reporting date be placed after the holidays too.

MR. BELL: I'll do that, Your Honor.

THE COURT: If they want to do that.

All right. The -- is there any legal reason why this should not be the sentence in this case, Mr. Bell?

MR. BELL: No, Your Honor.

MS. SUGAR: No, Your Honor.

THE COURT: All right. That is the sentence in this case.

All right. Mr. Boggs, you may appeal your conviction and sentence to the Fourth Circuit Court of Appeals. Any appeal must be done in writing and must be done within 14 days from when I sign the written judgment in this case. If you can't afford to appeal, you may appeal at government expense.

I would suggest you speak to your very able attorneys who can discuss with you as to whether or not you wish to under this circumstance appeal. However, do you understand your right to appeal as I have just explained it?

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Okay. Thank you.

All right. The Court will order that the defendant be -- remain on the same bond to be allowed to report when -- on his own when designated to the facility which is designated by the Bureau of Prisons for the defendant to serve his sentence.

Again, as I said earlier today to the other gentleman that got a prison sentence, you need to be there that day. In other words, whatever it is, get there early so it doesn't create an issue.

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: Because you don't want to lose -- the fact you get to report usually causes the level of incarceration to drop a little bit. They figure if you're safe enough to ask to come and you show up, you don't need this level. You can do this level of incarceration.

DEFENDANT BOGGS: Yes, Your Honor.

THE COURT: So it's a benefit. All right.

MR. BELL: Would you also direct that he not be designated prior to --

THE COURT: Yes, the Court orders that defendant not be designated until after January -- to report until after

January 1st.

MR. BELL: Thank you, Your Honor.

THE COURT: 2016.

All right. Anything further from the defense?

MR. BELL: No, Your Honor.

THE COURT: Anything further from the government?

MS. SUGAR: Yes, Your Honor. At this time we would move to dismiss the remaining counts in the indictment as to this defendant.

THE COURT: Let those be dismissed.

Anything further?

MS. SUGAR: No, Your Honor.

THE COURT: All right. This matter is concluded. Thank you.

(End of proceedings at 5:14 p.m.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF REPORTER

I, Cheryl A. Nuccio, Federal Official Realtime Court Reporter, in and for the United States District Court for the Western District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 1st day of January 2016.

s/Cheryl A. Nuccio

Cheryl A. Nuccio, RMR-CRR
Official Court Reporter